

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

76·6122

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-6122

B

SECRETARY OF THE INTERIOR, et al.,

Defendant-Appellants

v.

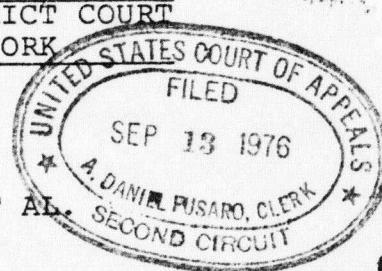
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COUNTY OF SUFFOLK, et al.,

Plaintiff-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT
NATIONAL OCEAN INDUSTRIES ASSOCIATION, ET AL.



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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF OF APPELLANT
NATIONAL OCEAN INDUSTRIES ASSOCIATION, ET AL.

JURISDICTION

On August 13, 1976, Judge Jack B. Weinstein, of the United States District Court for the Eastern District of New York, entered an order preliminarily enjoining appellant Thomas S. Kleppe, the Secretary of the Interior, from conducting Outer Continental Shelf (OCS) Sale No. 40 (Mid-Atlantic) on August 17, 1976, as then scheduled. Appellant Kleppe and appellant National Ocean Industries Association (NOIA), as well as eleven of NOIA's members, all of whom participate in one or more aspects of the broad range of activities relating to offshore exploration and development and were, like NOIA, intervenor-defendants below,^{1/} immediately filed notices of appeal and invoked this Court's jurisdiction under 28 U.S.C. § 1292(a)(1) to review Judge

1/ Joining National Ocean Industries Association in this appeal are National Supply Company, Continental Oil Company, Diamond M. Drilling Company, Digicon, Inc., Dresser Industries, Inc., Houston Oil & Minerals Corporation, Levingston Shipbuilding Company, Murphy Oil Corporation, Ocean Production Company, Transco Companies, Inc., and Zapata Corporation.

Weinstein's preliminary injunction order.^{2/} At the same time, appellants moved this Court for a stay of Judge Weinstein's order pending their appeal and urged that Sale No. 40 be allowed to go forward on August 17 as previously scheduled.

On August 16, 1976, a panel of this Court, consisting of Circuit Judge Van Graafeiland and District Judges Gagliardi (SDNY) and Kelleher (CD Cal.), sitting by designation, granted appellants' motion, holding that

"We find nothing in this case which satisfies us that the August 17, 1976 sale, in and of itself, will cause appellees any irreparable injury. On the other hand, the national interests, looking toward relief of this country's energy crisis, will be clearly damaged if the proposed sale is aborted." (JA 210).

At the same time, the Court ordered that the record and briefs with respect to Judge Weinstein's August 13 order be filed on designated dates in September and that this appeal be heard during the week of September 27.

Thereafter, plaintiff-appellees applied to Justice Thurgood Marshall, in his capacity as Circuit Justice for the Second Circuit, in an attempt to stay this Court's August 16 order and thereby, in effect, reinstate Judge Weinstein's August 13 preliminary injunction. After hearing oral argument from the parties and taking the matter under advisement, Justice Marshall orally announced on August 17 that he would not grant appellees' application for stay. On August 19, Justice Marshall issued a written order stating the reasons for his refusal to grant that application. (45 U.S.L.W. 3161, JA 212).

^{2/} Similarly appealing that order was the New York Gas Group ("NY Gas"), also an intervenor-defendant below.

Immediately after the oral announcement of Justice Marshall's decision, Sale No. 40 took place, resulting in the sale of leases on 93 of the 154 tracts offered in the Sale No. 40 area and payment by the successful bidders to the Federal Government of more than \$1.1 billion.

QUESTION PRESENTED

Judge Weinstein found the voluminous environmental impact statement (EIS) for Sale No. 40 inadequate solely on the ground that it contained no "meaningful discussion" and "apparently no real awareness" of the hypothesis that State and local jurisdictions had the power to bar the landing of pipelines to transport oil from OCS federal lands to on-shore locations and that it was "not inconceivable" that these jurisdictions might exercise that power and thereby force the use of tankers for the landing of such oil. The question presented here is whether, in so ruling, Judge Weinstein erred in the light of the facts that:

(a) the EIS recognized repeatedly that State and local governments could control land uses, even to the extent of banning pipelines, reiterated that tankers might have to be used in lieu of pipelines, and analyzed the environmental impact of the use of tankers;

(b) in articulating his holding, Judge Weinstein failed to apply or even recognize the "rule of reason" with which NEPA impact state-

ments are to be reviewed; and

(c) there was no evidence before the lower court that any of the adjacent Sale No. 40 States had ever stated that they would bar pipelines and thus force the use of environmentally-less desirable tankers for the landing of OCS oil.

STATEMENT OF THE CASE

This litigation commenced in February, 1975, about 18 months prior to the issuance of Judge Weinstein's preliminary injunction, when Suffolk and Nassau Counties, as well as other local governmental entities in central and eastern Long Island, New York, (hereafter called the "Long Island plaintiffs") filed a complaint seeking to enjoin the Secretary of the Interior from proceeding with any aspect of the national accelerated OCS leasing program, including Sale No. 40. Among the various grounds upon which these plaintiffs sought this relief were alleged violations by the Secretary and his subordinates of the National Environmental Policy Act (NEPA), 42 U.S.C. §4321.

While the Department at that time had published neither a draft nor final EIS for Sale No. 40, it had published a draft "programmatic" environmental impact statement for the national

accelerated leasing program (PEIS), which addressed the issue of opening up "frontier" OCS leasing areas where no offshore oil and gas exploration or production activity had previously taken place, such as the Atlantic OCS, portions of the Pacific OCS, and various OCS waters off Alaska.

Thereafter, following the publication of the EIS for Sale No. 40 on May 25, 1976 (I EIS ii) and the subsequent announcement by the Secretary of his intention to offer leases in the Sale No. 40 area to interested bidders, the Long Island plaintiffs amended their complaint to add a count attacking the adequacy of the EIS for Sale No. 40. In neither their original nor amended complaints, however, did the Long Island plaintiffs do more than assert the general inadequacy of the PEIS or EIS; there was no indication by them that they would assert local jurisdiction to bar the landing of any pipelines from the Sale No. 40 area, nor that the PEIS or EIS was inadequate with regard to its consideration of the authority of state and local jurisdictions to control the siting of OCS on-shore facilities, such as pipelines.

On June 29, 1976, the Long Island plaintiffs were joined by the State of New York and the Natural Resources Defense Council (NRDC), who filed a complaint against the Secretary, also seeking injunctive relief against Sale No. 40 and the accelerated OCS leasing program. However, also

like the Long Island plaintiffs, New York/NRDC did not allege in their complaint that New York or any other state intended to bar the landing of pipelines nor did they challenge specifically the EIS on the ground that it inadequately considered this possibility.

On July 15, New York/NRDC filed a motion for preliminary injunction with respect to Sale No. 40, followed by a memorandum dated July 19. (The Long Island plaintiffs filed no such motion or memorandum, but instead participated in the proceedings below on the basis of the legal theories and arguments developed in the New York/NRDC motion papers.) While spelling out a number of specific alleged defects in the EIS, New York/NRDC continued to remain silent as to State and local jurisdiction over pipelines.

On July 20, 1976, NOIA and eleven of its members, as well as the New York Gas Group ("NY Gas"), were allowed to intervene as defendants in this case, over the opposition of all the plaintiffs. NOIA's intervention papers, which had been filed on July 19, specifically set forth the interests of the association and the eleven members seeking intervention both as to the financial commitments which they had made in anticipation of Sale No. 40 (including preparations for bidding by parties seeking to lease Sale No. 40 properties and preparations for support activities to be provided to successful bidders), and as to the adverse impacts that would

befall their present and future employees, if the many jobs which Sale No. 40 promised were either delayed or aborted by the relief sought by the plaintiffs. Similarly, NY Gas described in its intervention papers the critical natural gas shortage in New York State and the relief promised by successful exploration for and production of natural gas in the close-by Sale No. 40 area.

Evidentiary hearings commenced on the New York/NRDC preliminary injunction motion on July 23 and continued for eleven successive weekdays until August 6. Eight of those eleven hearing days were devoted to the presentation of plaintiffs' evidence.

A succession of plaintiffs' witnesses testified as to a wide variety of alleged inadequacies in the EIS and PEIS, including purported deficiencies in discussing OCS technology, operating procedures and oil-spill clean up devices (Milgram, Tr. 91-189), the effects of oil spills on the marine and wetland environments in the Sale No. 40 area (Rachlin, Tr. 207-321; Teal, Tr. 322-419; McHugh, Tr. 892-1040; Freudenthal, Tr. 1129-1367), the on-shore impacts, such as the siting of pipelines and support installations, that would arise following exploration and development of the Sale No. 40 area (Mitchell, Tr. 426-892; Jarmer, Tr. 1569-1610; Thomas Tr. 1610-1634); and the alternatives to the proposed action, such as greater reliance on conservation, onshore production and other offshore areas

(Aitkinson, Tr. 1375-1569; Newlon, Tr. 1643-1736; Donkin,
Tr. 1737-1853).^{3/} Finally, plaintiffs offered voluminous documentary evidence bearing upon both the policy implications of accelerated development of the OCS, including the Mid-Atlantic area, and the decisional processes of the Department of Interior in determining to go forward with the accelerated program and Sale No. 40.

However, in neither their testimonial nor documentary evidence did the plaintiffs produce anything which indicated that the Mid-Atlantic states--New York, New Jersey, Delaware, Maryland and Virginia--had any intention of banning the placement of pipelines from the Sale No. 40 area or that the EIS had not adequately considered that possibility. None of their witnesses testified to having any knowledge, personal or otherwise, of an intention by any of these States

^{3/} Although presented in a much more expeditious fashion, defendants' evidence covered largely the same ground. NOIA sponsored four witnesses -- Oppenheimer and Smalley, who testified about the effects of oil on the marine environment; Wenstrom, who testified concerning the EIS's scrutiny of onshore impacts; and Hoult, an MIT engineer who testified about the spill trajectory analysis model used by the EIS in predicting the manner in which oil would spread from a spill in the Sale No. 40 area. NY Gas sponsored one witness, Luntey, who testified as to the acute shortage of natural gas in the New York area and the manner in which Sale No. 40 gas could alleviate that shortage. The Government's witness, Evans, testified as to the United States Geological Survey's (USGS) methods for regulating OCS operations.

to preclude the landing of OCS oil via pipeline; no evidence was offered either in oral or written form criticizing the impact statements' discussion of the authority of local and State governments to regulate land uses or to deal with the possibility that tankers might become necessary to land OCS oil by virtue of a State or local veto of pipelines. (See Part III A below).

The pipeline/tanker issue was not squarely raised until the close of all the evidence when, upon request of counsel, Judge Weinstein advised the parties as to the particular points that he wished covered in the post-hearing briefs on the New York/NRDC preliminary injunction motion. At that point, he stated that the Coastal Zone Management Act was of two-fold concern to him -- first, the extent to which Congress intended that the Secretary would not engage in OCS leasing until the completion of state plans under the Act; and, second, the extent to which such plans might affect the assumption made by the Secretary -- e.g. "the use of tankers against pipelines in a large strike situation." (Tr. 2636, JA 810). Even then, however, the lower court did not present this as a NEPA issue, but rather as one arising under the Coastal Zone Management Act. (See Tr. 2637 ll. 12-19, JA 811).

It is not, therefore, surprising that even after the close of all the evidence plaintiffs failed to urge that States could or would exercise their sovereign authority

to bar the landing of Sale No. 40 oil by pipelines. Indeed, as the transcript of the post-hearing argument on the motion indicates, New York did not even refer to its Wetlands Act in oral argument until the matter was specifically raised by Judge Weinstein. (See Tr. 2722 1.22-2728 1.13, JA 812-18).

As noted above, Judge Weinstein entered his order enjoining Sale No. 40 on August 13, 1976. With respect to all of the issues that had been litigated at trial and that had been the subject of the voluminous testimony and documents offered by both sides -- the adequacy of the EIS insofar as it considered the impact of oil on the environment, alternatives to the proposed action, on-shore impacts, feasibility of operating technology and clean-up procedures, etc. -- the lower court upheld the EIS:

"[O]n balance, an impartial reader of the EISs is driven to the conclusion that, within the limit of reasonable researchers and writers, a studied effort was made to present a fairly grim picture of possible environmental difficulties. If anything, the studies are almost too detailed and encyclopedic for a lay executive to fully comprehend. The final EIS Sale No. 40, together with the PDOD prepared by staff to summarize and clarify the issues for decision, satisfactorily meet both the spirit and the letter of NEPA requirements in all respects except one. . . ." (Order p. 31, JA 40).

The plaintiffs' contentions as to impact on the biota and environment generally were dismissed on the ground that

"In view of the enormous range in probabilities, an administrator such as the Secretary might well have concluded that the gross data available sufficiently apprised him of the overall dangers, so that further refinements were not worth the delays required to make them." (Order p. 19, JA 28).

As to the contention that operating procedures and the like were inadequate, the court found that there was

"no doubt of the technical capacity to establish drilling platforms, undersea pipelines and shore based facilities adequate to fully exploit these resources in the OCS over the next twenty-five years. Testimony and exhibits describing production in the North Sea, Gulf of Mexico and other areas demonstrated this capability as the most clearly established fact in the case."

(Order p. 7, JA 16).

As to the need for OCS oil, the court held that

"The growing dependence in the northeast region on imported oil from abroad, now at the rate of some 85% of consumption, and the shortages in natural gas are well known. . . . The cost and lack of availability of energy will, unless it is rectified, further disadvantage this region's relative ability to generate jobs, leading to further economic and social declines." (Order pp. 6-7, JA 15-16).

Even "the international implications of our energy dependence" were recognized by the court. (Order p. 8, JA 17).

As to the integrity of Interior's decisional processes, the court rejected the contentions of the plaintiffs as unproved. (Order pp. 32-33, JA 41-42). Indeed, Judge Weinstein specifically found that through publication of EISs, hearings and conferences "the state and local political entities most affected were advised of the plans, their implications, and their dangers" (Order p. 31, JA 40) and that "Congress was fully advised" (Order p. 32, JA 41).

Moving on from the ordinary NEPA and the policy/decisional processes issues to the Coastal Zone Management Act, the lower court concluded that that Act did not require the Secretary to

await the development of Coastal Zone Management plans by the affected States prior to authorizing leases in the Sale No. 4/
40 area.

Having thus resolved all of the NEPA issues which were advanced by the plaintiffs, as well as the Coastal Zone Management issue, against them, the court then turned to what it regarded as the determinative issue "left effectively unresolved" by the Coastal Zone Management Act (Order p.54, JA 64) -- the power of States, independent of that Act, "to exclude completely oil pipelines from off-shore and on-shore oil and gas facilities." (Id.) The court stated the hypothesis that

"if the states bordering the Sale 40 area prevented pipelines from OCS drilling sites from crossing their shores -- as states have the power to do -- then the only alternative for transporting oil would be by tankers."
(Order p. 55, JA 65).

Asserting that such state decisions were "not inconceivable" (Id.), Judge Weinstein went on to hold that, despite referrals in the EIS to local authority over this matter (see e.g., Order pp.57,58-59, JA 67, 68-69), the "total discussion" in the EIS indicated to

4/ The court, quite mistakenly, relied upon the legislative history of the 1976 amendments to that act in stating that following the adoption of Coastal Zone Management plans OCS leases issued on federal properties must be subject to the provisions of that statute. While NOIA strongly disagrees with that position and, indeed, offered below what we respectfully submit was a conclusive construction of the legislative history to establish precisely the contrary proposition -- that only post-leasing activities were subject to such plans (See Part III C below) -- the lower court's discussion of this matter, in the light of its holding that the Coastal Zone Management Act was not violated by the Secretary, was dicta with which this Court need not now be concerned.

him that the states either would not or could not prevent the laying of pipelines to land Sale No. 40 oil (Order p. 61,JA 71), that there was "apparently no real awareness" (Order p. 63,JA 73) of this issue, and that a "meaningful discussion" of the possible State-Federal confrontations which the court envisioned was absent from the EIS (Order p.66,JA 76). On this basis, and on this basis alone, the court found that the EIS for Sale No. 40 violated NEPA in such a fashion as to require the entry of a preliminary injunction to restrain the Secretary from holding Sale No. 40 on August 17.

INTRODUCTION AND SUMMARY OF ARGUMENT

In entering a preliminary injunction designed to prevent the Secretary from holding Sale No. 40 on this basis, the lower court erred in its analysis of the record and of the law. In the first place, the court's concern with the admittedly "hypothetical" possibility that the Mid-Atlantic states would bar the landing of pipelines and its finding that the "total discussion" of the EIS with respect to this issue was inadequate are wholly without support in the record. The EIS for Sale No. 40 and the PEIS for the accelerated OCS leasing program, of which Sale No. 40 is a part, discuss at length and in detail the rights of the States to control land uses within their jurisdictions and the concomitant possibility that tankers, instead of pipelines, would have to be used to land OCS oil should a state "veto" the use of pipelines. Indeed, the EIS for Sale No. 40 and the PEIS went so far as to analyze the environmental impact that would arise out of the use of tankers under these circumstances.

In finding a NEPA violation on this one point, the lower court not only ignored the record, but also disregarded clearly established legal principles concerning the "rule of reason" that must be used in evaluating impact statements for major federal actions. Instead of applying these settled legal principles in this case, the court sought to hold the Secretary to what would be an impossible level of detail in dealing with an almost imaginary issue and, in so doing, implied a level of judicial scrutiny of NEPA impact statements that is without precedent in the law of this or any other circuit.

Finally, the facts

(1) that the evidentiary record below is absolutely devoid of any indication that States would assert the power to bar pipelines for the landing of OCS oil, and indeed shows, as the court itself found, that there is an acute need in the Northeast States for the oil and natural gas which may underlay the Sale No. 40 area, so that there is every incentive for those States to assist, not retard, the development of the Sale No. 40 area;

(2) that, although they actively participated on every level of the administrative process in connection with both the accelerated leasing program and Sale No. 40 itself (and in so doing offered a wide variety of comments, criticisms and suggestions with respect to Atlantic OCS activities), none of the Mid-Atlantic States ever took the position that they would bar pipelines; and

(3) that Congress has provided a vehicle through the Coastal Zone Management Act, as recently strengthened by the 1976 amendments, to avoid State-Federal confrontations of the type envisioned by the court;

show that the hypothesis which constituted the sole basis for Judge Weinstein's order is so strained and artificial that the EIS would have been justified in completely failing to deal with this issue. In the light of the substantial and direct treatment of state and local jurisdiction over pipelines, the EIS certainly cannot be faulted solely for failing to discuss the matter in more detail.

Before proceeding to the specific discussion of these errors which vitiate the lower court's order, however, we wish to observe that the OCS program, of which Sale No. 40 represents a vital part, is fully consistent with (and indeed mandated by) national policy as enunciated by the Congress and the President and as recognized by the courts. The OCS Lands Act itself states that there is an

"urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the OCS."

43 U.S.C. § 1337 (emphasis supplied).

In addition, the Congress has recently found in legislation adopted since the Arab oil boycott that

". . . shortages of crude oil, residual fuel oil, and refined petroleum products caused by inadequate domestic production, environmental constraints and the unavailability of imports . . . have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting and curtailment of vital public services." 15 U.S.C. § 751, Act of Nov. 27, 1973.^{5/}

5/ See also § 2(a) of the Federal Energy Administration Act of 1974 (P.L. 93-275, 88 Stat 96).

The legislative history of recently passed or presently pending congressional proposals continues to recognize the need for expanded domestic production of energy, particularly from the OCS. Thus, as the Conference Committee on the 1976 Amendments to the Coastal Zone Management Act (16 U.S.C. § 1451) stated, there is an acute need

"to encourage new or expanded oil and natural gas production in an orderly manner from the nation's Outer Continental Shelf (OCS) . . . [as part of the] attainment of a greater degree of energy self-sufficiency, a recognized national objective of the highest importance and priority." (Report of the Committee of Conference No. 94-987, June 24, 1976, pp. 23-25) 6/

The President's annual energy message, which was released on February 26, 1976, very specifically identified the role of the OCS leasing program in responding to the United States' dependence on imported oil:

6/ See also, letter of Congressman John M.. Murphy, Chairman Ad Hoc Select Committee on OCS, dated March 31, 1976, transmitting Congressional Research Service Report on the OCS (Def. Ex. G):

"The importance of the energy resources of the outer continental shelf to meet the short-term and intermediate-term energy future of our Nation, cannot be overemphasized. Last year the United States imported approximately 37% of its total oil consumption, or 6 million barrels per day. This year imports are likely to rise to about 7.5 million barrels per day, or more than 40% of our total oil consumption.

"If we can develop the energy resources of the outer continental shelf, we can reverse the trend towards increasing imports. The outer continental shelf has vast oil and natural gas resources, which could benefit the Nation for several more decades, until alternative sources of energy have been developed." (Report p. v).

"The OCS particularly in the frontier areas, [such as the Mid-Atlantic area] provides a crucial new potential source of energy for the nation and could produce almost 3 MMB/D [million barrels per day] by 1985." 1976 Energy Message, Detailed Fact Sheet, p. 10. (Emphasis supplied.)^{7/}

These conclusions and policy recommendations have been at the heart of many recent decisions uniformly rejecting NEPA attacks, similar to those made by the present plaintiffs, upon OCS lease sales. See State of Alaska v. Kleppe, 9 E.R.C. ____ (D.D.C. August 13, 1976), on appeal, D.C. Cir. (Gulf of Alaska, Sale No. 39); Southern California Association of Governments v. Kleppe, 8 E.R.C. 1922 (D.D.C. 1976) (offshore Southern California, Sale No. 35); People of California v. Morton, 404 F.Supp. 26, 30 (C.D.Calif. 1975), on appeal, 9th Cir. (OCS Program in general and Sale No. 35); Public Citizen v. Morton (D.D.C. Civ. No. 74-739, 1975) (offshore Southern Texas, Sale No. 34); Sierra Club v. Morton (M.D. Fla., Civ. No. 73-1629,

^{7/} See also FEA 1976 National Energy Outlook, Executive Summary, pp. XXV, XXVIII (which relies upon a "strongly pursued" OCS program to meet the nation's near-term energy requirements); National Academy of Sciences "Mineral Resources and the Environment," pp. 81-82 (1975) (which concludes that "the second largest, but probably most accessable domestic oil and gas resource is under the continental shelves", and recommends "[t]hat there be speedy investigation of the continental shelves for oil and gas resources").

(1974), aff'd, 510 F.2d 813 (5th Cir. 1975) (Miss-Ala-Fla,
8/
Sale No. 32).

All of the impact statements for these previously unsuccessfully challenged OCS sales posed the same issue of state-federal jurisdiction, as it affects the use of pipelines or tankers to land OCS oil, which Judge Weinstein found lurking in this case. Indeed, since the OCS areas involved in Sale Nos. 35 and 39 were ones where a single state would have to serve as the base for on-shore support of offshore activities (there obviously being only one state in which to land Southern California or Gulf of Alaska oil), the possible "veto" by a state of OCS operations in those cases posed a far more critical problem than here, where five states with varying attitudes toward OCS operations adjoin the area.

But while vigorously opposing Sale Nos. 35 and 39 on a broad range of grounds (including inadequate coordination between Interior and state land use agencies), neither California nor Alaska ever took the position that it would bar pipelines

8/ NRDC v. Morton, 337 F.Supp 165 (D.D.C. 1971), aff'd, 458 F.2d 827 (D.C.Cir. 1972), is the only case in which an OCS sale was enjoined on the basis of EIS inadequacy. That proceeding arose shortly after the passage of NEPA when the Department of the Interior, like most other government agencies, had an imperfect understanding of its requirements; the EIS at issue there consisted of a 67-page statement which failed to discuss alternatives which the court subsequently found to be significant. Here, by contrast, the EIS for Sale No. 40 totals nearly 2,000 pages, the programmatic EIS totals 2,753 pages, and both discuss all relevant issues bearing upon development of the OCS.

or that the impact statements were inadequate because of their approach to this question. Therefore, the validation of those impact statements and the failure of other States affected by OCS operations or of other courts sua sponte, like Judge Weinsteins here, to identify the alleged defect which underlays the lower court's opinion in this case stand strongly against the result reached below.

Further underscoring the significance of these cases was the uncontradicted evidence below that the Mid-Atlantic area involved in Sale No. 40 was much safer, environmentally, than the areas involved in these prior cases. Thus, Russell W. Peterson, the Chairman of the Council on Environmental Quality (Peterson Dep. p. 5), testified that the Gulf of Alaska OCS leasing areas were "much more hazardest (sic)
than the mid-Atlantic" (Peterson Dep. p. 71). See also,

9/ Mr. Peterson continued (Dep. p. 72):

"We focused on that particular area [Gulf of Alaska]. It has rougher seas, the way the currents move, more spills would occur and certain to go ashore. There is a tremendous concern of vital areas for fisheries and bird life. It is one of the most critical areas in the world for earthquakes with tidalwaves (sic) which accompany earthquakes and, of course, very low temperatures (sic) makes it difficult to operate in the area. It has very serious bottom sediment problems.

"So, the combination of these factors led us to be appreciably more concerned about the Gulf of Alaska than any other Continental Shelf Programs.

"Q. Then, is it your testimony that these factors, which you just referred to, do not exist, to the same degree in the mid-Atlantic region?

"A. That is right."

Def. Ex. No. P, pp. 54-59, where the Stanford Research Institute in a September 1975 report to the U.S. Environmental Protection Agency concluded that, aside from the North Atlantic OCS area, the Mid-Atlantic region presented the smallest likelihood of adverse biological impacts from OCS oil, while the Gulf of Alaska and Southern California areas presented substantially greater risks.

Finally as to preliminary matters, the circumstances underlying the issuance of Judge Weinstein's injunction order call for a more liberal scope of review in this Court than the vast majority of the preliminary injunction orders which are brought to it. This litigation began 18 months before the issuance of the August 13, 1976, order now under review. During that period, the original plaintiffs were allowed, as the court observed in the post-hearing argument on the plaintiffs' motion, "full discovery [and] full trial" with respect to the development of each of their theories. (Tr. 2695).

This is not, then, one of those cases where trial court conclusions are "interlocutory, tentative, provisional" and where appellate courts are thus reluctant to exercise a full measure of review. See Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2d Cir. 1953); United States Steel Corp. v. Fraternal Ass'n of Steel Haulers, 431 F.2d 1046, 1048 (3d. Cir. 1970). Instead, Judge

^{10/} But see Omega Importing Corp. v. Petri-Kine Camera Co., 451 F.2d 1190, 1197 (2d Cir. 1971):

"Congress would scarcely have made orders granting or refusing temporary injunctions, an exception to the general requirement of finality as a condition to appealability

Weinstein's August 13 order, coming as it did after "full discovery [and] full trial," bears all the indicia of a final judgment. This is particularly so in the light of the severe impact which the grant of the relief ordered by the lower court would have had upon the public and the national interest, as observed by this Court in its August 16 order staying Judge Weinstein's injunction.

The fact that Judge Weinstein's order rests upon a demonstrably erroneous interpretation of NEPA also permits full judicial scrutiny in this Court. See Maryland-National Cap. Pk. & Pl. Com'n v. U.S. Postal Serv., 487 F.2d 1029, 1041 (D.C.Cir. 1973):

"It is traditional that appeals from the granting or denial of a temporary injunction generally involve matters of discretion with which an appellate court should hesitate to interfere. This is subject to an overriding doctrine that where the case has such a shape that it is governed by doctrines of law that the appellate court can reasonably identify, it should not hesitate to set forth the applicable legal principles merely because the application for permanent injunction has not been formally determined."

See also NRDC v. Morton, 458 F.2d 827, 832 (D.C.Cir. 1972).

(Footnote cont.)

. . . if it intended appellate courts to be mere rubber-stamps save for the rare cases when a district judge has misunderstood the law or transcended the bounds of reason."

ARGUMENT

As Judge Weinstein acknowledged in his order, the EIS for Sale No. 40 does, in fact, recognize that State and local jurisdictions do have a large measure of authority to control land uses and that their jurisdiction could be exercised to bar the landing of pipelines, thus forcing the use of tankers to land OCS oil in the Mid-Atlantic region. To Judge Weinstein, however, this discussion was not "meaningful." (Order p.66,JA 76). To him, in the context of the "total discussion" of the EIS concerning the landing of Sale No. 40 oil (Order p. 61, JA 71), there was "apparently no real awareness" (Order p.63,JA 73) of the dimensions of state control over land uses or the implications of that control as to the techniques which must be utilized to land Sale No. 40 oil. We will deal below (Part II) with the propriety of using these subjective tests for judging the adequacy of a NEPA impact statement. However, before turning to that discussion we first demonstrate that no reader of the EIS for Sale No. 40 and of the related PEIS for the accelerated leasing program could have been left with the slightest doubt either as to state and local control over land use or as to the possibility that pipelines might not be utilized to land Sale No. 40 oil and that tankers might thus under certain circumstances be required.

- I. The EIS for Sale No. 40 and the PEIS for the Accelerated Leasing Program Discuss in Detail and at Length the Very Issues upon which the Lower Court Found the NEPA Documents in this Case to be Inadequate.

We have placed before the Court, in full, both the EIS for Sale No. 40 and the PEIS for the accelerated leasing program in multiple copies so that the Court may have the opportunity to examine thoroughly these documents with respect to the issue upon which the lower court found a NEPA violation. We also submit that even a brief review of these documents will demonstrate the vast number of issues which the Department found it necessary to address in fulfilling its NEPA duties as to the transaction here at issue. While fully discussed in the EIS and PEIS, the pipeline tanker question was but one of more than a hundred issues ^{11/} which these voluminous documents addressed. Perforce, in preparing NEPA documents with respect to transactions as complex as an OCS sale or the accelerated leasing program there must be some editorial constraints as to the detail in which each issue is discussed. In fact, as Judge Weinstein held here, the NEPA documents for Sale No. 40 approach the level of being so "detailed and encyclopedic" that they could be difficult "for a lay executive to fully comprehend." (Order p. 31, JA 40). Surely, Judge

11/ Some sense of the enormous range of issues which the EIS drafters had to canvass can be obtained by reviewing III EIS 15-75, where comments of interested parties on 65 different topics are discussed.

Weinstein should have been (and this Court will be) aware of the implications of a construction of NEPA which, like the one underlaying the order now under review, would force impact statements to be written in such detail and volume that they would be practically impossible to compile and virtually incomprehensible to all but the most indefatigable reader.

A. The Discussion of State and Local Jurisdiction over Land Use.

Despite Judge Weinstein's conclusion to the contrary, the EIS for Sale No. 40 and the PEIS for the accelerated leasing program clearly recognize that state and local governments have broad powers to control land uses associated with OCS activities. At the very outset of the EIS for Sale No. 40, there is an 11-page discussion of Mid-Atlantic State coastal zone regulatory and legislative authority, both under the Coastal Zone Management Act and under existing state legislation, such as New Jersey's Coastal Area Facility Review Act. (I EIS 39-49). In the context of that discussion, the EIS specifically recognizes that:

"the types of development permitted in the coastal zone, including any that might be associated with offshore oil and gas operations in the event this proposed sale is held, can ultimately be broadly controlled by the States." (Id. at 40.)

Immediately following that section of the EIS, is a three-page section (I EIS 50-52) titled "Special Legislative Restrictions," discussing additional aspects of "existing State laws

regulating or controlling development, facility siting and emission levels [that] have application to the coastal zone" (Id. at 50), and recognizing that "any OCS-related facility development in the coastal zone would be subject to these regulations." (Id.)

Just a few pages later, there is a four-page discussion of "other planning mechanisms" dealing with the legal devices employed by the Mid-Atlantic states to allow local jurisdictions to exercise their authority over the coastal zone. (I EIS 58-61). Various multi-state planning agencies concerning land use controls are also described in this section.

While extensive, these portions of the EIS by no means stand alone in discussing State authority over coastal zone land uses. In Volume II of the EIS there is a five-page discussion of "State Regulation," detailing the present status of each of the Mid-Atlantic States with respect to both their coastal zone management plans under Federal legislation and existing State legislation. (II EIS 426-30). In that connection, it is recognized, for example, that "existing state legislation already provides a large measure of state control over the coastal zone in Delaware" (Id. at 426), that in Maryland "concurrence of local government is required for permit approval [of coastal zone facilities]" (Id. at 427), that in New Jersey "a permitting system is established controlling development in wetland areas under the Wetlands Act" and that the "state exerts control over the siting of specified facilities in a narrowly defined coastal

zone under its Coastal Area Facility Review Act" (Id. at 428), that in New York "some state control is now exerted in some parts of the coastal zone under the Tidal Wetland Act" (Id. at 429), and that similar "state control is exercised in the coastal area through the [Virginia] Wetlands Act, which requires permits for development in wetland areas" (Id. at 430).

Next follows a five-page section (II EIS 434-38) concerning Mid-Atlantic State programs requiring permits for the discharge of oil and creating fines and/or liabilities in the event of accidental discharge or spills, such as would attend the rupture of a pipeline.

A 17-page section (II EIS 449-65) then discusses the types of on-shore facilities, including pipelines, that will be utilized in the Mid-Atlantic area and summarizes existing regulatory schemes at the federal, state, and local level that can be implemented to mitigate the adverse effects of these facilities. In that connection, it is specifically recognized that:

"State authorities could be used to prohibit the placing of these facilities in certain types of areas. All five states, for instance, have legislation setting up programs that regulate the use of wetlands by way of a permitting system." (Id. at 451).

The application of these State regulatory systems to pipelines is discussed in detail:

"New Jersey 1/ and Maryland 2/ have legislation that would require permitting and appropriate

^{1/} Coastal Area Facilities Review Act (1973).

^{2/} Coastal Facilities Review Act (1975)."

environmental analysis for proposed pipelines in legislatively designated portions of the coastal zone. Although local plans may be formulated that identify desirable utility corridors, rarely do zoning plans restrict pipelines to predetermined locations. Local ordinances may, however, prescribe procedures for obtaining local review and approval of proposed pipelines. Direct federal responsibility for the siting of onshore facilities is limited except for federally administered lands. . . . State and local planning and regulatory authorities provide the primary framework within which potential adverse effects on the onshore facilities can be addressed.

* * *

"If commercial quantities of oil are discovered, pipeline corridor management studies will be initiated to identify the least environmentally hazardous areas in which to require the placement of pipelines. Although these studies are primarily concerned with the OCS, they will also include areas suitable for the location of onshore processing and support facilities, and will be coordinated with other Federal, State and local authorities." (Id. at 456-57).

Later, in the Alternatives section, the EIS returns to the same subject of State control of land uses. See II EIS 516-19. There it is recognized that "all activities and facilities associated with production, such as pipelines. . . will be undertaken subsequent to any initial discovery of producible reserves, which would be well after coastal zone plans have been implemented" (Id. at 516), thus clearly implying the applicability of those plans to pipeline placement. Indeed, this implication is made explicit in this section when it is recognized that the "siting of new facilities in all the states

is a function of local zoning and other regulations" (Id. at 518) and that "the extent to which the states will exert greater control over the siting of particular facilities and/or appropriate types of development for specific coastal areas will be a function of how this control is delegated under the evolving coastal zone management plans and the existing or proposed State regulations."

(Id.)

Then follows a seven-page section (II EIS 584-90), titled "State Participation in Development Decisions," with further recognition of the States' authority to control pipeline placement. Thus, for example, in discussing the coastal zone management programs of the States it is explicitly recognized that

"where the plans involve onshore facilities, such as pipeline landing sites and onshore support facilities, the ultimate approval. . . would be within the jurisdiction of the State." (Id. at 586).

Volume III of the EIS, which consists of responses to the comments made by various interested parties on the draft EIS, further recognizes State authority over onshore facilities. Thus, in response to the general criticism that the draft impact statement should provide more specific information regarding pipeline corridor studies and anticipated pipeline landfall zones, the final EIS recognizes that:

"Optimum pipeline development is partly a function of environmental capabilities (both offshore and onshore), operational and economic dictates, and transportation needs of the impacted area. Recognition of these parameters in a coordinated

Federal-State-industry effort will result in pipeline sitings which recognize zones of least environmental impact and which are economically feasible according to articulated studies, plans, and policies and controls." (III EIS 31).

Then, in response to the criticism that Interior should not operate on the premise it can use the shortest and cheapest pipeline route, it is specifically recognized that:

"State and local jurisdictions would have to permit both onshore sections of pipelines and pipelines in State waters, pipeline land falls in areas where they would cause great environmental impact are not likely." (III EIS 32).

If there were any doubt as to Interior's position concerning the broad powers of State and local jurisdictions to regulate onshore facilities, it plainly would be resolved by the statement that

"The Department of the Interior has no authority by statute regarding the planning and siting of onshore OCS-related facilities. The States, counties, and local municipalities are responsible for enforcing their own statutes, regulations, and zoning and permitting powers. . . [The filing of OCS development plans with the States] will provide the States with more detail regarding offshore resources and onshore facilities that will be needed in order that the States can better plan and coordinate the industry needs with all their State, county, and local authorities." (III EIS 64).12/

12/ The sharing of this information with the States for this purpose was specifically recommended by EPA. See III EIS 139, 150-51. In that connection, it is pertinent here to note that EPA, although criticizing somewhat the lack of specificity with respect to the location of onshore facilities, did not suggest that Interior had ignored the authority of State and local governments to control the siting of onshore facilities. See e.g., III EIS 151-53.

Finally in the EIS for Sale No. 40, a number of Mid-Atlantic states made mention of State and local controls over land uses (and these comments were reproduced in full in the EIS), although none of them took the position that they would exercise that authority to bar the landing of pipelines in their States. See Part III B below.

The PEIS for the accelerated leasing program, which addresses the issue of opening up all OCS frontier areas, not just the Mid-Atlantic, also recognized the authority of State and local jurisdictions to control siting of onshore facilities, albeit in necessarily less detail with respect to the mid-Atlantic area than the site-specific EIS for Sale No. 40. See, e.g., I PEIS ^{13/} 131-33; II PEIS 193-94, 774, 908-09, 951-52, 1004-05.

In light of all the above, there simply can be no question but that the EIS for Sale No. 40 and the PEIS for the accelerated leasing program adequately set forth the nature of State and local jurisdiction to regulate the siting of onshore

13/ Finally, the Program Decisional Option Document (PDOD) for Sale No. 40 (JA 1004-70) - which discusses policy, economic, technical and environmental aspects of the sale -- recognizes that a pipeline requirement for landing Sale No. 40 oil can be imposed only "if feasible pipeline rights-of-way can be determined and obtained" (JA 1061). The PDOD for the sale specifically notes that state and local governments "can control the placement of onshore support facilities" (JA 1018). Similarly, it analyzes the present state of evolution of coastal zone management plans (JA 1018) and notes that these plans should be implemented by 1977, well in advance of the time when "permanent onshore operations bases are" anticipated -- i.e., 1979 (JA 1022). Judge Weinstein's holding that the PDOD "makes a firm assumption that pipelines will be used" (Order p. 60, JA 70) simply ignores these portions of the PDOD.

OCS facilities, including pipelines, and specifically recognized that that jurisdiction could be exercised to bar the landing of pipelines in a State or to restrict them to particular areas.

B. Discussion of the Use of Tankers in Lieu of Pipelines.

After giving exhaustive recognition to the States' jurisdiction to control the onshore siting of facilities from the Sale No. 40 OCS area, the EIS, as well as the PEIS for the OCS program, went on to deal extensively with the implications arising out of that jurisdiction -- i.e., that, if States were to utilize their powers to so block the landing of pipelines, it would be necessary to use tankers, in lieu of pipelines, to land OCS oil. Almost at the very beginning of the Sale No. 40 EIS, the assumption was introduced that tankers might have to be used to land Sale No. 40 oil:

"If tankers were to be utilized, they would proceed to terminals at the existing Mid-Atlantic refineries. Barging for transporting continuous production will be prohibited by stipulation (except in emergencies) and tankers off loading to barges in estuaries or bays is not anticipated." (I EIS 15, see also Id. at 17.)

In the light of the State and local authority discussed in the EIS, the assumptions as to the use of pipelines are repeatedly qualified; it is only "anticipated that all oil and gas produced as a result of this proposed sale will be transported to

shore by pipeline," and it is explicitly recognized that "a possibility exists that tankers might be used." (II EIS 17). The use of pipelines is "expected," not guaranteed. (II EIS 11).

Indeed, the nexus between the possible use of tankers, in lieu of pipelines, and the exercise of State jurisdiction with respect to the landing of pipelines is explicitly drawn in the EIS:

"if it should not be technically and/or economically feasible to bring production ashore by pipelines, tankers may have to be used.^{1/} It is thought that tankers in the range of 30,000 to approximately 70,000 dead weight tons would be utilized if use of tankers should become necessary. . . . Transportation of oil directly from the production site to terminals would be expected, due to the relatively short distance, thereby avoiding any lightering operations."

"^{1/} Factors which could hinder or prohibit use of pipelines in this Mid-Atlantic area might include the following: (1) volume of resources found uneconomic for pipeline transport, (2) distribution of geologic structures prove capable of economic production of oil and gas are widespread in relation to each other, and (3) receptivity of State and local jurisdictions along Mid-Atlantic coasts to the approval of pipeline landfalls that would be needed." (II EIS 20-21, emphasis supplied).

In light of this possibility, there follows a three-page discussion (II EIS 30-32) of tanker accidents and the like that might arise in the landing of Sale No. 40 oil, "if pipelines are

found to be technically or economically not feasible or if rights-of-way are denied in State waters. . . ." (II EIS 30, emphasis supplied). Thereafter, this section of the EIS describes the additional impacts of Sale No. 40 based upon the use of tankers, rather than pipelines, to land OCS oil.

Other sections of EIS highlight the possible use of tankers to land Sale No. 40 oil. Thus, in the context of describing the impact of the sale on tanker traffic in Mid-Atlantic ports, it is noted that there will be a decline in the volume of such traffic only "if OCS oil is brought to shore via pipelines," thus plainly implying that it might be brought to shore via tankers. (II EIS 169). Again, in discussing the possible impact upon wetlands from Sale No. 40 operations, it is stated only that "two to eight pipelines may come ashore" (II EIS 478) and that "if pipelines come ashore" (II EIS 479), they might cause damage to plants and animals lying directly in the pipeline corridor, once again implying the possible use of transportation techniques other than pipelines.

Also, in responding to comments of interested parties, the drafters of the EIS recognized their assumption that tanker traffic would not change was dependent upon the transmission of oil by pipelines. In that connection, they stated that the EIS "does recognize that if tankers have to be used, crude oil may mean a slight increase in the amount of vessel traffic." (III EIS 18).

Finally, a response to comments of NRDC (one of the plaintiff-appellees here) and to the State of Delaware, both of whom criticized the draft EIS for imposing the qualification that pipelines would be used only "where technically and economically feasible," places in sharp focus the error underlying Judge Weinstein's order. Judge Weinstein found that the feasibility of pipelines for landing Sale No. 40 oil was a "cornerstone" of the planning for the sale. (Order p.55,JA 65). He seized upon the fact that the drafters of the EIS placed "heavy reliance on the pipelines" to support his holding as to the inadequacy of the EIS with respect to the state/local jurisdiction over land use issue.

But as the drafters of the EIS stated in response to NRDC and Delaware, the Department was "committed to the concept of requiring transportation of oil via pipelines, rather than allowing tanker transportation," in the light of the environmentally superior characteristics of pipelines. (III EIS 46). However, as they also explained, "in order to be realistic" the stipulations requiring the use of pipelines had to be "phrased to take into account that there may be situations where [the] . . . use of pipelines are not feasible" (Id.), such as where ^{13a/} they are barred by local jurisdictions. ^{13a/} In short, the EIS recognized throughout that pipelines should be utilized, properly reflecting the Department's commitment to requiring the safest

13a/ See also, the Notice for Sale No. 40 (JA 1090, 1091 (July 16, 1976), embodying a stipulation (No. 4) on Sale No. 40 leases requiring pipelines "if pipeline rights-of-way can be determined and obtained."

operating procedures for developing the Sale No. 40 properties, but it also realized that it did not have complete authority to impose a pipeline requirement, in the light of the kind of issue identified by Judge Weinstine in his opinion below.

Like the EIS committed to the use of pipelines where feasible, the PEIS for the accelerated program similarly recognized the potential use of tankers, in lieu of pipelines, to land OCS oil, although it also recognized that at present 96.5% of OCS oil is placed ashore via pipelines. (I PEIS 60). Thus, in a 13-page section dealing with the landing of OCS oil (I PEIS 60-72), it is recognized that such oil "can be moved ashore either by a tank vessel (barge or ship) or pipeline." (Id. at 60). The types of tankers and barges that can be used for that purpose are then discussed in a four-page section (I PEIS 60-63) that describes sizes, drafts, types of ship design, method of transfer of oil into or out of such vessels, and the like.

The PEIS also has an elaborate 30-page discussion (II PEIS 26-55) of "Impacts Resulting from [Oil Spill] Accidents," including "Tanker and Tank Barge Accidents and Operations" (II PEIS 39-42). Reference is made to prior studies of this question. (II PEIS 39, 41). Indeed, this section concludes with an elaborate analysis of the "Throughput Spillage Rates" associated with the production and delivery of OCS oil, depending upon whether such oil is landed "without tankers," "with tankers and without pipelines," or "with both tankers and pipelines." (II PEIS 45, 47).

Finally, the PEIS sets forth a five page discussion of a CEQ-commissioned MIT study of "Spills Larger Than 1,000 Barrels" (II PEIS 56-60). The study sets forth the probabilities of such OCS-related spills, whether arising from the use of pipelines (Id. at 57-58) or tankers (Id. at 58).

Thus, just as was the case with respect to the issue of the jurisdiction of States to control the placement of pipelines in State waters and on State lands, the impact statements associated with Sale No. 40 adequately recognize the possibility that tankers might have to be used to land such oil and provide a great deal of significant information concerning the environmental impacts that would attend the use of such transportation techniques.

II. In Holding the Above Discussion of the State and Local Jurisdiction/Pipeline Issue Inadequate under NEPA, the Lower Court Committed Clear Error Concerning the Requirements of that Statute.

In striking down the EIS for Sale No. 40 solely on the ground that it gave inadequate consideration to the role of the States in determining transportation techniques for the landing of OCS oil, Judge Weinstein conceded

that the EIS referred to this issue. (Order p. 61, JA 71). Indeed, several of the extracts from the EIS from which the court quoted to support its conclusion that the EIS made the "firm assumption" that pipelines would be used, in fact, explicitly recognized the "possibility exists that tankers might be used" (Order p. 57, JA 67) and explicitly addressed the issue of state and local authority over wetlands (Order pp. 58-59, JA 68-69).

Judge Weinstein, however, dismissed the many sections of the EIS dealing with this issue on the ground that they did not constitute a "meaningful discussion" of the problem (Order p. 66, JA 76) or, in his judgment, "apparently" lead to "no real awareness" of the issue with which he was concerned (Order p. 63, JA 73). In applying these obviously subjective standards for assessing the adequacy of an impact statement, Judge Weinstein committed a clear error of law with respect to the requirements of NEPA.

The Statement of the Case plainly indicates that none of the parties had developed any evidence during the hearings with respect to the ultimately determinative issue in this case and accordingly did not present evidence either to support or detract from the rationale ultimately employed by Judge Weinstein in issuing his preliminary injunction order. Indeed, the issue upon which he decided this case was squarely raised

only after the close of the evidentiary hearings, when Judge Weinstein set forth his view of the issues which should be briefed by the parties.

While the Due Process clause arguably permits trial judges wide latitude in injecting issues into a proceeding (provided the parties are given the opportunity to develop evidence with respect to them), it seems clear in this case that the eleventh hour introduction of this question into the case may well explain the failure of the trial court to adequately assess the voluminous impact statements bearing upon Sale No. 40 as to this issue and provide at least some basis for understanding how Judge Weinstein could have ignored the many pages of the EIS and PEIS dealing precisely with the issue raised by him.

In any event, it is clear that Judge Weinstein's holding that the voluminous discussion of the State/local authority issue and the concomitant impact of that authority on the use of pipelines versus tankers to land OCS oil is flatly inconsistent with settled principles under NEPA, both in this circuit and in all other federal courts.

There is a "rule of reason" which courts have developed with respect to the standards to be utilized under NEPA to evaluate the adequacy of an impact statement. This Court has recently

offered a succinct and clear statement of this rule:

"[A]n EIS is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible."

NRDC v. Callaway, 524 F.2d 79, 88 (2d Cir. 1975)

The two OCS leasing cases that have previously received appellate scrutiny have also clearly and specifically recognized that an impact statement for such a transaction cannot deal exhaustively with each of the many issues that it must address, but instead need only develop in reasonable detail the issues of primary concern. Sierra Club v. Morton (MAFLA), 510 F.2d 813, 819 (5th Cir. 1975); NRDC v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972). See also, New York v. Kleppe, supra, where Justice Marshall in denying appellees' application for a stay in this proceeding recognized that the requirements of NEPA are "tempered by a practical 'rule of reason.'"

Judge Weinstein, both in his holding below that the exhaustive discussion of the state/local jurisdiction, pipeline/tanker issue was inadequate and in that portion of his Order which discussed the applicable legal principles under NEPA (Order pp. 67-70, JA 77-80), completely ignored the rule of reason. Instead, he stated that NEPA was "an environmental full disclosure law" (Order p. 67, JA 77), pursuant to which even issues

such as the possible future law enforcement strategies of State and local governments, which cannot now be known, must be discussed in detail. That the court was holding the Secretary to this impossible level of compliance plainly emerges from its statement that

"These controls [of state and local governments] on land development along the coast will mean that much of the on-shore activity that will accompany OCS exploratory drilling and production will be regulated and subject to approval by the states. Without more coordination between the states and the federal government it is impossible to predict with accuracy the impact OCS development will have on the seashore. Certainly the information the Secretary had at the time of his decision as to Sale No. 40 did not permit a sound judgment as to what the five states affected by the sale would sanction." (Order pp.65-66, JA 75-76, emphasis supplied).

Despite the States' failure to articulate their own attitudes toward pipelines (See part III B below), the Secretary was faulted for not undertaking any analysis of, *inter alia*, the "probable extent of state cooperation or opposition" to the mid-Atlantic OCS program. (Order p. 66, JA 76). The lower court did not even begin to suggest how, in the flux of changing political administrations and public attitudes towards environmental/energy trade-offs, the Secretary or anyone else could begin to gauge, let alone analyze, such issues.

It is quite clear, however, that NEPA does not require this kind of "crystal ball inquiry," NDRC v. Morton, supra, 458 F.2d at 837, nor does it require an agency to "foresee the unforeseeable," Scientists Institute For Public

Information v. AEC, 481 F.2d 1079, 1092 (D.C. Cir. 1973). Accord, Citizens for Safe Power, Inc. v. NRC, 524 F.2d 1291, 1297 n. 9 (D.C. Cir. 1975); Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1084 (D.C. Cir. 1974). See also, the Supreme Court's recent observation in Kleppe v. Sierra Club, 44 U.S. L.W. 5104, 5107 n. 14 (June 28, 1976), that "appropriate allowance for the inexactness of all predictive ventures" must be made in judging NEPA impact statements.

These principles apply with particular force when the alternative or consequence to be discussed, like the one here, lies beyond the control of the agency writing the EIS. For example, the D.C. Circuit has stated that "there is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of 'alternatives' . . . deemed only remote and speculative possibilities, in view of basic changes required in . . . policies of other agencies." NRDC v. Morton, supra, 458 F.2d at 837-38. Indeed, the Fifth Circuit has adopted the "rule that the sufficiency of an EIS must be determined without reference to possible future action." Sierra Club v. Morton, (MAFLA), supra, 510 F.2d at 824. To the same effect, this Court has stated that "there is no need to consider . . . alternatives which could only be implemented after significant changes in governmental policy . . ." NRDC v. Callaway, supra, 524 F.2d at 93.

The manner in which the "rule of reason" allows great flexibility to agencies, which must develop impact statements in the face of future uncertainties, is particularly applicable to OCS sales. As the Fifth Circuit held in validating the impact statement for the MAFLA sale:

"The (Outer Continental Shelf) sale is a unique form of federal action. It does not involve a single undertaking or a project which becomes a fait accompli the day the decision to proceed is made. Because it contemplates numerous successive lessor-lessee relationships involving activities over many areas and over many years, the agency's continuing opportunity for making informed adjustments has a major effect upon our evaluation of the sufficiency of the materials contained in the EIS itself."

Sierra Club v. Morton, (MAFLA) supra, 510 F.2d at 828.

This principal is particularly applicable to the issue relied upon by the lower court to invalidate the EIS for Sale No. 40. As the court held (Order p. 76, JA 86), the production or development phase for Sale No. 40 -- the first instance when pipelines or tankers might be utilized to land OCS oil -- will not take place for at least three years following the sale. During that time, the Secretary has a broad range of regulatory authority (including suspension of OCS leases if necessary to prevent environmental damage^{14/})

14/ See Gulf Oil v. Morton, 493 F.2d 141 (9th Cir. 1973).

by which to mitigate any environmentally adverse consequences that might arise in connection with the issue underlying Judge Weinstein's order. In that regard, the EIS indicates that supplemental impact statements on the production/development phase may be utilized to assess industry development plans, which, of course, would address the feasibility of landing oil via pipeline or tankers. (III EIS 44).

Moreover, the mitigating measures implemented at the time of the Sale itself -- such as the lease stipulations which limit lessee actions upon OCS properties (JA 1090-94) -- further underscore the lower court's error in not recognizing the principles articulated in MAFLA. As can readily be seen, the Department has, in imposing these restrictions upon lessee activities, indicated quite clearly its intention to exercise continuing jurisdiction over Sale No. 40 properties and has made manifest its commitment to keeping State and local jurisdictions informed, so as to maintain the Federal-State cooperation which Judge Weinstein agreed was "essential" in developing the resources of the Sale No. 40 area in the most expeditious and intelligent manner possible.

^{15/} The fact is, the lower court discussed at some length the manner in which current departmental regulations require the submission by lessees of detailed plans for exploration and development, as well as how the stipulations to be incorporated in the leases, require notice of activities to be filed with Governors of each of the mid-Atlantic states so that they "can participate in the approval of the production development program" in a timely fashion. (Order 52-53, JA 62-63).

Still another aspect of the lower court's erroneous approach to the requirements of NEPA was its failure to realize that under the "rule of reason" reviewing courts should view the EIS "as a whole." Carolina Environmental Study Group v. United States, supra, 510 F.2d at 799; Stop H-3 Association v. Brinegar, 389 F.Supp. 1102, 1112 (D. Hawaii 1974). Likewise, courts must not "fly speck" environmental impact statements. Brooks v. Coleman, 518 F.2d 17, 19 (9th Cir. 1975). In accordance with this principle, the courts have excused minor defects in otherwise adequate impact statements. See Sierra Club v. Froehlke, 534 F.2d 1289, 1296-97 (8th Cir. 1976); Cummington Preservation Committee v. FAA, 524 F.2d 241, 243-44 (1st Cir. 1975); Daly v. Volpe, 514 F.2d 1106, 1112 (9th Cir. 1975); Canal Authority of the State of Florida v. Callaway, 489 F.2d 567, 577 (5th Cir. 1974); National Helium Corp. v. Morton, 486 F.2d 995, 1004 (10th Cir. 1973).

Having reviewed the "detailed and encyclopedic" EIS for Sale No. 40 (Order p.31,JA 40), and having upheld it as to all of the many issues raised by the plaintiffs with respect to its purported inadequacy, the lower court should not have relied upon a single alleged defect to invalidate the impact statement and halt the proposed federal action, particularly when that defect turned upon a hypothetical set of circumstances which might arise in the future and when Judge Weinstein faulted the EIS only in a "quantitative" fashion for failing to say enough about this issue.

Finally, as to the errors of law implicit in the lower court's approach to the EIS here, it failed to take into consideration the fact that, although all of the Mid-Atlantic states filed written comments with respect to both the EIS for Sale No. 40 and the PEIS for OCS leasing in general, none of them took the position in those comments or anywhere else (see part III B below) that it would bar the landing of pipelines throughout the state and thus force the use of tankers to land OCS oil.

Since several courts have excused the utter failure of an EIS to discuss a particular topic on the ground that it was not raised by plaintiffs in the comments which they made during the administrative proceedings prior to final publication of the EIS, Sierra Club v. Morton (MAFLA), supra, 510 F. 2d at 826; NRDC v. TVA, 367 F.Supp.128,131 (E.D.Tenn.1973), aff'd per curium, 502 F.2d 852 (6th Cir.1974); EDF v. Froehlke, 368 F.Supp. 231, 241 (W.D. Mo. 1973), aff'd on other grounds, 497 F.2d 1340 (8th Cir. 1974),^{16/} the lower court should at least

16/ Cf. Friends of Earth v. EPA, 499 F.2d 1118, 1126 (2d Cir. 1974); NRDC v. EPA, 494 F.2d 519, 525 (2d Cir. 1974), where this Court recognized that administrators cannot be expected to anticipate every conceivable issue that might subsequently be raised by a litigant in court and that this should be taken into account in judging the propriety of their actions.

have considered the position set forth by the commenting states in determining the adequacy of the discussion of the pipeline/tanker issue in the EIS.

Indeed, the legal principles which emerge from these cases apply with particular force here, since it was precisely the Mid-Atlantic States who had it within their sole power to advise the Secretary as to the enforcement philosophies they intended to take with respect to the landing of pipelines.

Having given no concrete indication that they intended to bar pipelines, the Secretary could have been excused for failing even to discuss this possibility. Surely, having discussed it in the detail set forth in Part I above he cannot be held to have violated NEPA when the affected jurisdictions were silent on the question.

The section of Judge Weinstein's opinion dealing with the NEPA violation that he found below (Order pp.54-71, JA 64-81), does not contain even a glimmer of recognition of any of these governing legal principles under NEPA. While it is, of course, true that the EIS and PEIS could have said more about the State/Federal pipeline/tanker issue (just as they could have addressed in more detail the myriad other matters which were discussed), there simply can be no question but that this issue was discussed in at least the "reasonable" detail required by NEPA. Quite clearly then, to uphold Judge Weinstein's rendition of NEPA in this case would be to extend that statute to the "unreasonable extremes" that courts have uniformly condemned. See e.g., NRDC v. Morton, supra, 458 F.2d at 838.

III. The Record Below Contains No Indication
that State or Local Governments Will
Wholly Bar the Landing of Pipelines in
Sale No. 40 Areas so as to Occasion the
Use of Tankers

Judge Weinstein observed in his remarks at the close of
the evidentiary hearings:

"I think one of the defense witnesses may well have put his finger on the matter in a short, pithy statement when he said that the document [EIS] was unduly gloomy, in view of the testimony generally with respect to the Scottish, North Sea and Gulf situations. It does seem to me that in general the most gloomy pictures were posed here . . ." (Tr. 2638).

The fact is, it is this "gloomy" attitude, perhaps reflecting the over-conscientiousness of the drafters of the EIS, that explains the fact that there was any, let alone the detailed, consideration given to the problem of state or local veto of pipeline placement and the concomitant use of tankers, instead of pipelines to land Sale No. 40 oil. For there is nothing in the record of this proceeding, either in the testimony taken at trial, the administrative proceedings underlying publication of the EIS and PEIS, or general legal principles, which substantiates the crucial hypothesis underlying Judge Weinstein's order. No evidence exists that the threat of vetoing pipelines was so real and imminent that the impact statement could be invalidated and the proposed federal action enjoined, solely because the already massive amount of material devoted to this subject could be supplemented with still further discussion.

A. The Evidentiary Record Developed in the District Court Does Not Support the Rationale Upon Which the Court Rested its Decision.

As noted in the Statement of the Case, the plaintiffs offered no evidence to support the hypothesis which constitutes the sole foundation of the decision below. To be sure, Judge Weinstein at two or three isolated points during the hearings raised what he referred to as a "hypothetical" situation, wherein a State might exercise its jurisdiction to bar pipelines and so require the use of tankers. (See Tr. 701-02, JA 423-24; Tr. 2422-23).

However, none of the witnesses endorsed the assumption underlying this hypothetical situation. NOIA's onshore expert, Dr. Wenstrom, stated that such a position by the Mid-Atlantic States

"would be entirely unrealistic and in fact an extreme position to take, because I don't think pipeline landfalls are incompatible with every square mile of . . . the ocean-front of any of those states." (Tr. 2422).

Dr. Mitchell, the New York/NRDC onshore expert, similarly failed to supply support for this hypothesis. When asked whether the State of New Jersey exercised control over the siting of onshore facilities connected with OCS development (Tr. 709, JA 427), he discussed at length an OCS Federal-State dispute in California (Tr. 710-11, JA 428-29) to support his conclusion

"that the Federal Government can, under certain circumstances, have the ultimate responsibility, the ultimate control." (Tr. 712, JA 430).

See also Dr. Mitchell's testimony at Tr. 719, ll. 16-20; 720, l. 18-721, l. 7; 722, l. 20-723, l. 4; 762, ll. 14-19. Indeed, Dr. Mitchell's testimony was so repetitive and consistent on this point that the lower court ultimately sustained an objection to the line of cross-examination seeking to be developed by the Government's trial counsel, apparently in the hope of getting Dr. Mitchell to admit that the State of New Jersey had significant power to control onshore siting of facilities and thus to lessen the impact of activities associated with OCS Sale No. 40. (Tr. 780-81, JA 445-46).^{17/}

If Dr. Mitchell was critical at all with respect to this matter, it was that the federal government had not been sufficiently firm in requiring pipeline transportation of OCS oil:

"I think they [the writers of the EIS] might well have said that once you require pipeline transportation -- not that it should be where it is economically and psychologically [sic technologically] feasible, but it ought to be required. I think they might have said that a

17/ The sole mention of pipeline vetoes by Dr. Mitchell occurred during cross-examination by the Government's trial counsel, when Dr. Mitchell was asked to assume that New Jersey might deny the grant of pipeline permits in its coastal zone and said, straightforwardly, that "if New Jersey denies permission to bring pipelines ashore, they can't bring them ashore." (Tr. 673-75, JA 417-19). Patently, the witness did not testify that New Jersey would take such a position.

program for requiring sites -- site acquisition facilities would be undertaken in the coastal zone and perhaps requiring common development of those sites by all companies" (Tr. 565, JA 397).

Thus, the testimony offered at trial and the documents received in evidence provide no support for Judge Weinstein's order.

B. The Position of the Affected States During the Administrative Proceedings.

The Mid-Atlantic States, which as Judge Weinstein observed in his order, were kept fully advised of the "plans," "implications," and "dangers" of Sale No. 40 as it could potentially impact them (Order p. 31, JA 40), took an active role in the administrative proceedings leading up to the Department's decision to proceed with Sale No. 40. At no point, however, did they take the position that they would exercise their jurisdiction to bar the landing of pipelines and to force the use of tankers to land OCS oil.

One of the first occasions for state input was the publication on October 18, 1974 of the draft PEIS for the accelerated OCS leasing program which contemplated, for the first time, OCS activity in the Mid-Atlantic region.^{18/} Thereafter, the States

^{18/} See II PEIS 367 A. The PEIS has a typographical error in stating that the draft PEIS was made available on October 18, 1975; the final PEIS was published well before that date, on July 7, 1975 (I PEIS iii).

affected by the OCS accelerated leasing program were invited to submit comments at hearings held throughout the United States, including those conducted at Trenton, New Jersey, on February 11, 12, 13 and 14, 1975. (II PEIS 367 B-C).

Each of the Mid-Atlantic states potentially affected by Sale No. 40 took full advantage of this opportunity and submitted comments upon OCS activities in the Mid-Atlantic that would affect them, and the drafters of the final PEIS responded to each of those comments. See II PEIS 711-17 (Delaware); 753-79 (Maryland); 897-932 (New Jersey); 937-63 (New York); 985-1013 (Virginia). While displaying different attitudes towards OCS activity in the Mid-Atlantic region, none of these States took the position that it had or would in the future consider the exercise of State and local jurisdiction to bar the landing of pipelines for OCS oil.

The next stage of the administrative process where the states had an opportunity to take a position with respect to this issue occurred during the initial site-selection process for Sale No. 40. See generally I EIS 6-10. As set forth in the EIS,

"In March 1975 a Call for Nominations was issued. The Call invited industry to nominate tracts within the broad area which they would like to see offered for lease. Interested parties or persons, including State Governments, were also invited in the Call to indicate tracts or areas which they felt should be withheld from leasing for environmental or other reasons." (Id. at 6).

Thereafter, meetings were held in July and August 1975 at Interior, to which representatives of the Mid-Atlantic States were invited,

resulting in the paring down of the initial 557 tracts nominated by industry to the 154 tracts finally settled upon as an initial offering of OCS properties in the Mid-Atlantic area. (Id. at 10). Although the Mid-Atlantic States sent representatives to one or more of those meetings (see III EIS 525-26), there is no indication either in the record below or in the administrative record reflected in the EIS itself (see pp. 52-53 below) that any of those states took the position during those meetings that certain tracts should not be leased because of the potential that they would veto pipelines.^{19/}

Finally, a draft EIS for Sale No. 40 itself was published on December 10, 1975, and public hearings were held with respect to that EIS in Atlantic City, New Jersey, during January 1976 (Order p. 10, JA 19). Once again, each of the Mid-Atlantic states took advantage of the opportunity extended to it to comment upon Mid-Atlantic OCS operations, yet failed to assert that it or any other local or State jurisdictions had decided to bar the landing of pipelines on State lands. See also III EIS 63.

New York (III EIS 182-240) said only that it had not yet formulated a coastal zone management plan and requested that the sale be delayed until its plan was approved, a position rejected by Judge Weinstein, at least insofar as he found that the Coastal Zone Management Act did not require the Secretary to so delay OCS leasing. As to the possible veto by states of pipelines, New York

^{19/} Judge Weinstein's suggestion that consideration of the States' positions on pipelines might affect tract selection (Order p. 66-67, JA 76-77) fails to mention that the States passed up the opportunity to raise this issue in a timely fashion.

did not suggest what its position would be, but stated only that "if approval cannot be obtained from the states for pipelines, the impact of tankers must be considered more carefully" (III EIS 224), a comment which could well be interpreted as seeking a further developmental impact statement on tankers should their use be needed, as opposed to a criticism of the present EIS. Compare pp. 42-43 above. In any event, since the EIS demonstrated that there were no plans to place OCS pipelines in New York (II EIS 216-352, cf. Tr. 2808), that State's position on this question is largely, if not wholly, irrelevant.

New Jersey -- a State where pipelines might land (See Id.) -- failed to indicate the hostility towards pipelines apparently expected by Judge Weinstein. Instead, its comments related to the care which must be taken to locate pipeline corridors to mitigate impacts. See e.g., III EIS 258:

"pipeline corridors should be designed to avoid significant shellfish and finfish resources so as to minimize impacts of the burying procedure and accidental ruptures possibly resulting from fishing or shellfish harvesting operations. Corridors should also bypass exposed rock formations and hazardous dump sites. . . ."

The Delaware (III EIS 275-92) and Virginia (III EIS 317-26) comments are utterly silent on the pipeline issue, while Maryland simply underscored the need for joint Federal-State cooperation in planning as to any pipelines that might be brought ashore in that State (III EIS 293, 303-04).

Patently, the entities that had the best basis for judging whether there was likely to arise a State-Federal impasse over

the placement of pipelines to land Sale No. 40 oil -- the affected States themselves -- by their silence exposed the lack of any factual foundation to support the hypothesis underlying Judge Weinstein's order.

The reasons for this silence clearly emerge from the rationale of the lower court's own order. As Judge Weinstein held, the Atlantic OCS has "substantial value in reducing projected oil and gas energy deficits" in the Northeast States. (Order p. 6, JA 15). He also recognized that increasing costs and lack of availability of oil and gas in the region will "unless it is rectified, further disadvantage this region's relative ability to generate jobs, leading to further economic and social decline." (Order p. 7, JA 16). In the light of these findings and the uncontested fact that the vetoing of pipelines would require the use of tankers, which in turn would lead "to increased possibilities of pollution" from OCS operations (Order p. 9, JA 18), it simply strains credulity to the breaking point to believe that any Mid-Atlantic State would be so shortsighted as to prevent the landing via pipelines of vitally needed oil in its jurisdiction.

20/

20/ The only instance of a state-federal confrontation referred to in the record is a dispute with the California Coastal Commission concerning a facility located near Santa Barbara. (Tr. 710-12, JA 428-30). This testimony does not suggest that California was seeking to bar the use of pipelines and force the landing of OCS oil via environmentally more hazardous tankers. The fact is, the nub of the controversy with California was

The only conceivable motivation that might underlie the State-Federal confrontation envisioned by Judge Weinstein's order would arise out of an extremely parochial State interest to prevent completely the landing of oil in that State, via either pipeline or tanker, and to force the oil to be taken to another more distant jurisdiction which would have to bear the hazards of tanker transportation. It is doubtless because this position is so clearly contrary to the public interest and so manifestly inequitable -- seeking as it does to cast the burdens of OCS operations on other jurisdictions, while allowing the Mid-Atlantic States to profit from the energy resources which might be found in the nearby Sale No. 40 area -- that no State has ever seen fit to take this position.

C. The Coastal Zone Management Act Further Reduces the Possibility of State-Federal Confrontations

The already remote possibility of State opposition to oil pipelines is further diminished by the Coastal Zone Management Act, 16 U.S.C. §1451, et seq. (1976), as amended by, P.L. 94-370 (July 26, 1976) ("CZMA").^{21/} Although Judge Weinstein discussed

(footnote continued)

precisely to the contrary -- the state was insisting upon the use of pipelines, instead of tankers, to transport oil between Santa Barbara and refineries in the Los Angeles area. See Calif. Coastal Zone Resolution of Mar. 3, 1976, p.13, referring to "the State's policy of moving petroleum from the Santa Barbara channel to refineries by pipeline rather than by tanker." Thus, the California dispute lends no substance whatever to the hypothesis that states might veto pipelines and thus force the use of more hazardous tankers.

^{21/} See Statutory Appendix hereto. Because the 1976 amendments have not yet been codified, citations to the CZMA hereinafter will be to the section numbers in the Statutes at Large, 86 Stat. 1280, as amended, in conformance with the Statutory Appendix.

certain provisions of that Act in some detail, it appears that he did not fully consider the manner in which the CZMA was intended to and will promote cooperation and conciliation between the States and Federal governments and thus reduce the likelihood of the State/Federal confrontations which he hypothesized.

The CZMA is an attempt to assist the States "in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone. . . ." CZMA § 301(h). Accord, CZMA §§303, 309. The basic scheme of the CZMA contemplates close Federal and State cooperation: (1) federal funds are disbursed to the States to encourage development of State coastal zone management programs; (2) the programs are developed in consultation with relevant federal and local agencies; (3) the State program is then submitted to the Secretary of Commerce who must review and approve the program; (4) following such program approval, federal licensees (such as OCS lessees) must certify the consistency of their activities with the State's program, insofar as they impact a State's coastal zone; (5) disputes between a State and a federal licensee as to such consistency are then mediated by the Secretary of Commerce, with the cooperation of the Executive Office of the President; and (6) finally, should such mediation not resolve any such disputes the Secretary can nonetheless approve a federal licensee's proposed activities in a State's coastal zone, if he finds that such activities are consistent with the purposes of the Coastal Zone Management Act or are otherwise necessary in the interest of national security. These mechanisms were specifically intended

to provide "incentives to coastal states . . . to encourage and facilitate the achievement of the basic national objective of increasing domestic energy production." Report of the Committee of Conference, No. 94-1298, 94th Cong., 2d Sess. 23 (1976). Accord, CZMA § 301(i); H.R. No. 94-878, 94th Cong., 2d Sess. 14 (1976).
^{22/}

The incentive for States to bring their coastal zone planning and regulatory mechanisms under the CZMA and to thus cooperate with federal interests is, quite simply, money. Thus, under the 1976 Amendments to that Act (CZMA §308) \$1.2 billion of impact aid, in the form of loans, loan guarantees and grants, is authorized for States participating in the programs contemplated by the Act. Without federal approval of the State management program, a State is ineligible to receive administrative grants under the CZMA for the costs of administering the state's management program. CZMA §306(a). Moreover, a State's management program must provide:

22/ Regulations promulgated by the Secretary of Commerce under the CZMA require States in the early stages of development of their programs to contact "relevant federal agencies" for the purpose of arranging participation of such agencies in the formulation of the state programs. 15 C.F.R. § 925.3(b). The State and each relevant federal agency are then required throughout the development of the program to maintain "such relationships and communications with one another as will enable each to be fully informed of the other's views in relation to the program as it is developed." 15 C.F.R. § 925.4 (1976).

Under the Regulations, the program must then be submitted to the Department of Commerce for review and approval, and if it determines that the program complies with the requisite criteria set forth in the Act, a draft and a final environmental impact statement is prepared and each relevant federal agency is given the opportunity for review and comment. 15 C.F.R. § 925.5 (1976).

"for adequate consideration of the national interest involved in planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature." CZMA § 306(c)(8).

In addition, before granting approval to a State program, the Secretary must find that the program provides "for a method of assuring that local land and water use regulations within the coastal zone do not unreasonably restrict or exclude land and water uses of regional benefit."^{23/} CZMA § 306(e)(2).

Any fair reading of the CZMA and its legislative history shows that the Act was intended to facilitate the implementation of federal energy programs and to assist the States in expediting,

23/ The opinion below states that "the Secretary may, however, not make the 'siting of any energy facility . . . a prerequisite to, or a condition of, financial assistance.' Coastal Zone Management Act of 1972, as amended, § 308(i). This provision ensures against coercion by the Secretary and guarantees the states' independence." (Order pp. 41-42, JA 51-52). The portion of Section 308(i) of the CZMA omitted in the quotation above, however, makes it clear that the Secretary is only prohibited from interceding in a land use or water use decision of a coastal State as to an energy facility, by making the siting "in a particular location a prerequisite to, or a condition of, financial assistance under this section." CZMA § 308(i) (emphasis added). Thus, the Secretary could not condition a grant under the State's coastal energy impact program on the State's willingness to provide for the location of an energy facility, such as an oil pipeline, in a particular place. This does not mean, however, the Secretary could not prevent the State, as a condition of such a grant, from totally barring the use of a particular energy facility, such as an oil pipeline.

rather than obstructing, the construction of necessary energy facilities in coastal zones:

"The national objective of attaining a greater degree of energy self-sufficiency would be advanced by providing Federal financial assistance to meet state and local needs resulting from new or expanded energy activity in or affecting the coastal zone." CZMA § 302(i).

The 1976 amendments to the CZMA were intended to assist States and local communities further by providing impact aid, and thus in preparing the States for energy facilities to accelerate OCS development and to "enable the states to cope with an accelerated offshore oil and gas leasing program, deep water ports and similar energy facilities," such as oil pipelines. H.R. Rep. No. 94-878 94th Cong., 2d Sess. 13 (1976).

Of course, State management programs may affect how a federal program is carried out, but because the CZMA requires that such programs be developed with input by federal agencies and be subject ultimately to federal approval, the States do not exercise any veto power over federal programs by virtue of the CZMA. To the contrary, veto power resides in the Secretary of Commerce after exhausting the processes of mediation.

The only way a State can avoid federal review of its coastal zone management program is to refuse to submit such a program. However, it is unlikely that a State would forego altogether the opportunity to share in federal monies available under the CZMA over the issue of oil pipelines. Moreover, as the court below noted in its opinion (Order p. 49-50, JA 59-60), each State in the Mid-Atlantic region is currently developing a manage-

ment program under the CZMA. Assuming these states follow through and secure approval of their programs, any state action taken with respect to the use of oil pipelines will be subject to federal ^{24/} input and ultimate control under the CZMA.

CONCLUSION

The above discussion clearly elucidates three points, each of which is fatal to the order entered below by Judge Weinstein: First, the EIS and PEIS discuss in great detail the very matters which the lower court held they inadequately addressed; Second, the rationale of the lower court, both in its holding and in its exposition of the principles to be applied in this case, evidences a clear disregard for the "rule of reason" with which NEPA must be construed; and Third, the evidentiary and administrative record in this proceeding, as well as the provisions of the

24/ In the light of the carefully tailored state-federal scheme embodied in the CZMA, NOIA does not concede that Judge Weinstein was correct in assuming that States are free to ignore that statute and to block federally-authorized construction of pipelines over state borders pursuant to their inherent sovereign rights. Because of the interstate nature of OCS pipelines and the overriding federal interests at stake here, such unilateral State action might well violate the Commerce Clause -- see Transcontinental Gas P.L.C. v. Hackensack Meadow Dev. Corp., 464 F.2d 1358 (3d Cir. 1972), cert. denied 409 U.S. 1118, Continental Pipe Line Co. v. Belle Fourche Pipeline Co., 372 F.Supp. 1333 (D. Wyo 1974); New York State Natural Gas Corp. v. Town of Elma, 182 F.Supp. 1 (W.D.N.Y.); cf. Pennsylvania v. West Virginia, 262 U.S. 553 (1923) -- or the Supremacy Clause -- see Union Oil Co. of California v. Minier, 437 F.2d 408 (9th Cir. 1970); United States v. City of Chester, 144 F.2d 415 (3d Cir. 1944); cf. California v. Zook, 336 U.S. 725, 729 (1949); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

Coastal Zone Management Act, utterly vitiate the hypothesis upon which the lower court rested its decision.

For these reasons, Judge Weinstein's August 13, 1976, order should be vacated.

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September 10, 1976

STATUTORY APPENDIX

COASTAL ZONE MANAGEMENT ACT AMENDMENTS OF 1976 (P.L. 94-370)

INCORPORATED INTO THE

COASTAL ZONE MANAGEMENT ACT OF 1972 (P.L. 92-583)

(Compiled by United States Department of Commerce,
National Oceanic and Atmospheric Administration.)*/

*/ Neither USC nor USCA has published the Coastal Zone Management Act of 1972, as amended by Public Law 94-370. Accordingly, for the Court's convenience, we are furnishing this copy of the amendment Act, as prepared by NOAA. Those portions of the Act which were added by the 1976 Amendments are underlined, while those portions which were deleted are enclosed in [brackets].

AN ACT

To establish a national policy and develop a national program for the management, beneficial use, protection, and development of the land and water resources of the land and water resources of the Nation's coastal zones, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to provide for a comprehensive, long-range, and coordinated national program in marine science, to establish a National Council on Marine Resources and Engineering Development, and a Commission on Marine Science, Engineering and Resources, and for other purposes", approved June 17, 1966 (80 Stat. 203), as amended (33 U.S.C. 1101-1124), is further amended by adding at the end thereof the following new title:

TITLE III--MANAGEMENT OF THE COASTAL ZONE

SHORT TITLE

Sec. 301. This title may be cited as the "Coastal Zone Management Act of 1972."

CONGRESSIONAL FINDINGS

Sec. 302. The Congress finds that --

(a) There is a national interest in the effective management, beneficial use, protection, and development of the coastal zone.

(b) The coastal zone is rich in a variety of natural, commercial, recreational, ecological, industrial, and esthetic resources of immediate and potential value to the present and future well-being of the Nation.

(c) The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation,

waste disposal, and harvesting of fish, shellfish, and other living marine resources, have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion.

(d) The coastal zone, and the fish, shellfish, other living marine resources, and wildlife therein, are ecologically fragile and consequently extremely vulnerable to destruction by man's alterations.

(e) Important ecological, cultural, historic, and esthetic values in the coastal zone which are essential to the well-being of all citizens are being irretrievably damaged or lost.

(f) Special natural and scenic characteristics are being damaged by ill-planned development that threatens these values.

(g) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate. [and]

(h) The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.

(i) The national objective of attaining a greater degree of energy self-sufficiency would be advanced by providing Federal financial assistance to meet state and local needs resulting from new or expanded energy activity in or affecting the coastal zone.

DECLARATION OF POLICY

Sec. 303. The Congress finds and declares that it is the national policy ,

(a) to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations, (b) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone giving full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development, (c) for all Federal agencies engaged in programs affecting the coastal zone to cooperate and participate with state and local governments and regional agencies in effectuating the purposes of this title, and (d) to encourage the participation of the public, of Federal, state, and local governments and of regional agencies in the development of coastal zone management programs. With respect to implementation of such management programs, it is the national policy to encourage cooperation among the various state and regional agencies including establishment of interstate and regional agreements, cooperative procedures, and joint action particularly regarding environmental problems.

DEFINITIONS

Sec. 304. For the purposes of this title--

[(a) "Coastal] (1) The term "coastal zone" means the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the United States territorial sea. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters. Excluded from the coastal zone are

lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.

[(b) "Coastal] [(2) The term "coastal waters" means [(1)] (A) in the Great Lakes area, the waters within the territorial jurisdiction of the United States consisting of the Great Lakes, their connecting waters, harbors, roadstead, and estuary-type areas such as bays, shallows, and marshes and [(2)] (B) in other areas, those waters, adjacent to the shorelines, which contain a measurable quantity or percentage of sea water, including, but not limited to, sounds, bays, lagoons, bayous, ponds, and estuaries.

[(c) "Coastal] [(3) The term "coastal state" means a state of the United States in, or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. For the purposes of this title, the term also includes Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(4) The term "coastal energy activity" means any of the following activites if, and to the extent that (A) the conduct, support, or facilitation of such activity requires and involves the siting, construction, expansion, or operation of any equipment or facility; and (B) any technical requirement exists which, in the determination of the Secretary, necessitates that the siting, construction, expansion, or operation of such equipment or facility be carried out in, or in close proximity to, the coastal zone of any coastal state:

(i) Any outer Continental Shelf energy activity.

(ii) Any transportation, conversion, treatment, transfer, or storage of liquefied natural gas.

(iii) Any transportation, transfer, or storage of oil, natural gas, or coal (including, but not limited to, by means of any deepwater port, as defined in section 3(10) of the Deepwater Port Act of 1974 (33 U.S.C. 1502(10)).

For purposes of this paragraph, the siting, construction, expansion, or operation of any equipment or facility shall be "in close proximity to" the coastal zone of any coastal state if such siting, construction, expansion, or operation has, or is likely to have, a significant effect on such coastal zone.

(5) The term "energy facilities" means any equipment or facility which is or will be used primarily--

(A) in the exploration for, or the development, production, conversion, storage, transfer, processing, or transportation of, any energy resource; or

(B) for the manufacture, production, or assembly of equipment, machinery, products, or devices which are involved in any activity described in subparagraph (A).

The term includes, but is not limited to (i) electric generating plants; (ii) petroleum refineries and associated facilities; (iii) gasification plants; (iv) facilities used for the transportation, conversion, treatment, transfer, or storage of liquefied natural gas; (v) uranium enrichment or nuclear fuel processing facilities; (vi) oil and gas facilities, including platforms, assembly plants, storage depots, tank farms, crew and supply bases, and refining complexes; (vii) facilities, including deepwater ports, for the transfer of petroleum; (viii) pipelines and transmission facilities; and (ix) terminals which are associated with any of the foregoing.

[d] "Estuary] (6) The terms "estuary" means that part of a river or stream or other body of water having unimpaired connection with the open sea, where the sea water is measurably diluted with fresh water derived from land drainage. The term includes estuary type areas of the Great Lakes.

[e] "Estuarine] (7) The term "estuarine sanctuary" means a research area which may include any part or all of an estuary and any island, transitional area, and upland in, adjoining, or adjacent to such estuary, and which constitutes to

the extent feasible a natural unit, set aside to provide scientists and students the opportunity to examine over a period of time the ecological relationships within the area.

[(f) "Secretary" means the Secretary of Commerce.]

(8) The term "Fund" means the Coastal Energy Impact Fund established by section 308(h).

(9) The term "land use" means activities which are conducted in, or on the shorelands within, the coastal zone, subject to the requirements outlined in section 307(g).

(10) The term "local government" means any political subdivision of, or any special entity created by, any coastal state which (in whole or part) is located in, or has authority over, such state's coastal zone and which (A) has authority to levy taxes, or to establish and collect user fees, or (B) provides any public facility or public service which is financed in whole or part by taxes or user fees. The term includes, but is not limited to, any school district, fire district, transportation authority, and any other special purpose district or authority.

(g) "Management] (11) The term "management program" includes, but is not limited to, a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the state in accordance with the provisions of this title, setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone.

(12) The term "outer Continental Shelf energy activity" means any exploration for, or any development or production of, oil or natural gas from the outer Continental Shelf (as defined in section 2(a) of the Outer Continental Shelf Lands Act (43 U.S.C. 1331(a))), or the siting, construction, expansion, or operation of any new or expanded energy facilities directly required by such exploration, development, or production.

(13) The term "person" means any individual; any corporation, partnership, association, or other entity organized or existing under the laws of any state; the Federal Government; any state, regional or local government; or any entity of any such Federal, state, regional, or local government.

(14) The term "public facilities and public services" means facilities or services which are financed, in whole or in part, by any state or political subdivision thereof, including, but not limited to, highways and secondary roads, parking, mass transit, docks, navigation aids, fire and police protection, water supply, waste collection and treatment (including drainage), schools and education, and hospitals and health care. Such term may also include any other facility or service so financed which the Secretary finds will support increased population.

(15) The term "Secretary" means the Secretary of Commerce.

[(h) "Water] (16) The term "water use" means activities which are conducted in or on the water; but does not mean or include the establishment of any water quality standard or criteria or the regulation of the discharge or runoff of water pollutants except the standards, criteria, or regulations which are incorporated in any program as required by the provisions of section 307(f).

[(i) "Land use" means activities which are conducted in or on the shorelands within the coastal zone, subject to the requirements outlined in section 307(g).]

MANAGEMENT PROGRAM DEVELOPMENT GRANTS

[Entire Old Section 305 Significantly Revised]

Sec. 305. (a) The Secretary may make grants to any coastal state--

(1) under subsection (c) for the purpose of assisting such state in the development of a management program for the land and water resources of its coastal zone; and

(2) under subsection (d) for the purpose of assisting such state in the completion of the development, and the initial implementation, of its management program before such state qualifies for administrative grants under section 306.

(b) The management program for each coastal state shall include each of the following requirements:

(1) An identification of the boundaries of the coastal zone subject to the management program.

(2) A definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters.

(3) An inventory and designation of areas of particular concern within the coastal zone.

(4) An identification of the means by which the state proposes to exert control over the land uses and water uses referred to in paragraph (2), including a listing of relevant constitutional provisions, laws, regulations, and judicial decisions.

(5) Broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority.

(6) A description of the organizational structure proposed to implement such management program, including the responsibilities and interrelationships of local, areawide, state, regional, and interstate agencies in the management process.

(7) A definition of the term "beach" and a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value.

(8) A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for anticipating and managing the impacts from such facilities.

(9) A planning process for (A) assessing the effects of shoreline erosion (however caused), and (B) studying and evaluating ways to control, or lessen the impact of, such erosion, and to restore areas adversely affected by such erosion.

No management program is required to meet the requirements in paragraphs (7), (8), and (9) before October 1, 1978.

(c) The Secretary may make a grant annually to any coastal state for the purposes described in subsection (a)(1) if such state reasonably demonstrates to the satisfaction of the Secretary that such grant will be used to develop a management program consistent with the requirements set forth in section 306. The amount of any such grant shall not exceed 80 per centum of such state's costs for such purposes in any one year. No coastal state is eligible to receive more than four grants pursuant to this subsection. After the initial grant is made to any coastal state pursuant to this subsection, no subsequent grant shall be made to such state pursuant to this subsection unless the Secretary finds that such state is satisfactorily developing its management program.

(d)(1) The Secretary may make a grant annually to any coastal state for the purposes described in subsection (a)(2) if the Secretary finds that such state meets the eligibility requirements set forth in paragraph (2). The amount of any such grant shall not exceed 80 per centum of the costs for such purposes in any one year.

(2) A coastal state is eligible to receive grants under this subsection if it has--

(A) developed a management program which--

(i) is in compliance with the rules and regulations promulgated to carry out subsection (b), but

(ii) has not yet been approved by the Secretary under section 306;

(B) specifically identified, after consultation with the Secretary,
any deficiency in such program which makes it ineligible for approval by the
Secretary pursuant to section 306, and has established a reasonable time schedule
during which it can remedy any such deficiency;

(C) specified the purposes for which any such grant will be used;

(D) taken or is taking adequate steps to meet any requirement under
section 306 or 307 which involves any Federal official or agency; and

(E) complied with any other requirement which the Secretary, by rules
and regulations, prescribes as being necessary and appropriate to carry out the
purposes of this subsection.

(3) No management program for which grants are made under this subsection
shall be considered an approved program for purposes of section 307.

(e) Grants under this section shall be made to, and allocated among, the
coastal states pursuant to rules and regulations promulgated by the Secretary;
except that--

(1) no grant shall be made under this section in an amount which is more
than 10 per centum of the total amount appropriated to carry out the purposes
of this section, but the Secretary may waive this limitation in the case of any
coastal state which is eligible for grants under subsection (d); and

(2) no grant shall be made under this section in an amount which is less than
1 per centum of the total amount appropriated to carry out the purposes of this
section, but the Secretary shall waive this limitation in the case of any coastal
state which requests such a waiver.

(f) The amount of any grant (or portion thereof) made under this section
which is not obligated by the coastal state concerned during the fiscal year for
which it was first authorized to be obligated by such state, or during the fiscal

year immediately following, shall revert to the Secretary who shall add such amount to the funds available for grants under this section.

(g) With the approval of the Secretary, any coastal state may allocate to any local government, to any areawide agency designated under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, to any regional agency, or to any interstate agency, a portion of any grant received by it under this section for the purpose of carrying out the provision of this section.

(h) Any coastal state which has completed the development of its management program shall submit such program to the Secretary for review and approval pursuant to section 306. Whenever the Secretary approves the management program of any coastal state under section 306, such state thereafter--

(1) shall not be eligible for grants under this section; except that such state may receive grants under subsection (c) in order to comply with the requirements of paragraphs (7), (8), and (9) of subsection (b); and

(2) shall be eligible for grants under section 306.

(i) The authority to make grants under this section shall expire on September 30, 1979.

ADMINISTRATIVE GRANTS

Sec. 306. [(a) The Secretary is authorized to make annual grants to any coastal state for not more than 66 2/3 per centum of the costs of administering the state's management program, if he approves such program in accordance with subsection (c) hereof. Federal funds received from other sources shall not be used to pay the state's share of costs.]

(a) The Secretary may make a grant annually to any coastal state for not more than 80 per centum of the costs of administering such state's management program if the Secretary (1) finds that such program meets the requirements of

section 305(b), and (2) approves such program in accordance with subsections (c), (d), and (e).

(b) Such grants shall be allocated to the states with approved programs based on rules and regulations promulgated by the Secretary which shall take into account the extent and nature of the shoreline and area covered by the plan, population of the area, and other relevant factors. Provided, That no annual grant made under this section shall be in excess of \$2,000,000 for fiscal year 1975, in excess of \$2,500,000 for fiscal year 1976, nor in excess of \$3,000,000 for fiscal year 1977 provided further that no annual grant made under this section shall be less than 1 per centum of the total amount appropriated to carry out the purposes of this section: And provided further, That the Secretary shall waive the application of the 1 per centum minimum requirement as to any grant under this section, when the coastal State involved requests such a waiver.

(c) Prior to granting approval of a management program submitted by a coastal state, the Secretary shall find that:

(1) The state has developed and adopted a management program for its coastal zone in accordance with rules and regulations promulgated by the Secretary, after notice, and with the opportunity of full participation by relevant Federal agencies, state agencies, local governments, regional organizations, port authorities, and other interested parties, public and private, which is adequate to carry out the purposes of this title and is consistent with the policy declared in section 303 of this title.

(2) The state has:

(A) coordinated its program with local, areawide, and interstate plans applicable to areas within the coastal zone existing on January 1 of the year in which the state's management program is submitted to the Secretary, which plans have been developed by a local government, an areawide agency designated pursuant to regulations established under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, a regional agency, or an interstate agency; and

(B) established an effective mechanism for continuing consultation and coordination between the management agency designated pursuant to paragraph (5) of this subsection and with local governments, interstate agencies, regional agencies, and area wide agencies within the coastal zone to assure the full participation of such local governments and agencies in carrying out the purposes of this title; except that the Secretary shall not find any mechanism to be "effective" for purposes of this subparagraph unless it includes each of the following requirements:

(i) Such management agency is required, before implementing any management program decision which would conflict with any local zoning ordinance, decision, or other action, to send a notice of such management program decision to any local government whose zoning authority is affected thereby.

(ii) Any such notice shall provide that such local government may, within the 30-day period commencing on the date of receipt of such notice, submit to the management agency written comments on such management program decision, and any recommendation for alternatives thereto, if no action is taken during such period which would conflict or interfere with such management program decision, unless such local government waives its right to comment.

(iii) Such management agency, if any such comments are submitted to it, within such 30-day period, by any local government--

(I) is required to consider any such comments,

(II) is authorized, in its discretion, to hold a public hearing on such comments, and

(III) may not take any action within such 30-day period to implement the management program decision, whether or not modified on the basis of such comments;

(3) The state has held public hearings in the development of the management program.

(4) The management program and any changes thereto have been reviewed and approved by the Governor.

(5) The Governor of the state has designated a single agency to receive and administer the grants for implementing the management program required under paragraph (1) of this subsection.

(6) The state is organized to implement the management program required under paragraph (1) of this subsection.

(7) The state has the authorities necessary to implement the program, including the authority required under subsection (d) of this section.

(8) The management program provides for adequate consideration of the national interest involved in [the siting of facilities necessary to meet requirements which are other than local in nature.] planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature. In the case of such energy facilities, the Secretary shall find that the state has given such consideration to any applicable interstate energy plan or program.

(9) The management program makes provision for procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, or esthetic values.

(d) Prior to granting approval of the management program, the Secretary shall find that the state, acting through its chosen agency or agencies, including local governments, areawide agencies designated under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, regional agencies, or interstate agencies, has authority for the management of the coastal zone in accordance with the management program. Such authority shall include power--

(1) to administer land and water use regulations, control development, in order to ensure compliance with the management program, and to resolve conflicts among competing uses; and

(2) to acquire fee simple and less than fee simple interests in lands, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program.

(e) Prior to granting approval, the Secretary shall also find that the program provides:

(1) for any one or a combination of the following general techniques for control of land and water uses within the coastal zone;

(A) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement of compliance;

(B) Direct state land and water use planning and regulation; or

(C) State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any state or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.

(2) for a method of assuring that local land and water use regulations within the coastal zone do not unreasonably restrict or exclude land and water uses of regional benefit.

(f) With the approval of the Secretary, a state may allocate to a local government, an areawide agency designated under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, a regional agency, or an interstate agency, a portion of the grant under this section for the purpose of carrying out the provisions of this section: Provided, That such allocation shall not relieve

the state of the responsibility for ensuring that any funds so allocated are applied in furtherance of such state's approved management program.

[(g) The state shall be authorized to amend the management program. The modification shall be in accordance with the procedures required under subsection (c) of this section. Any amendment or modification of the program must be approved by the Secretary before additional administrative grants are made to the state under the program as amended.]

(g) Any coastal state may amend or modify the management program which it has submitted and which has been approved by the Secretary under this section, pursuant to the required procedures described, in subsection (c). Except with respect to any such amendment which is made before October 1, 1978, for the purpose of complying with the requirements of paragraphs (7), (8), and (9) of section 305(b), no grant shall be made under this section to any coastal state after the date of such an amendment or modification, until the Secretary approves such amendment or modification.

(h) At the discretion of the state and with the approval of the Secretary, a management program may be developed and adopted in segments so that immediate attention may be devoted to those areas within the coastal zone which most urgently need management programs: Provided, That the state adequately provides for the ultimate coordination of the various segments of the management program into a single unified program and that the unified program will be completed as soon as is reasonably practicable.

[INTERAGENCY] COORDINATION AND COOPERATION

Sec. 307. (a) In carrying out his functions and responsibilities under this title, the Secretary shall consult with, cooperate with, and to the maximum extent practicable, coordinate his activities with other interested Federal agencies.

(b) The Secretary shall not approve the management program submitted by a state pursuant to section 306 unless the views of Federal agencies principally affected by such program have been adequately considered. [In case of serious disagreement between any Federal agency and the state in the development of the program the Secretary, in cooperation with the Executive Office of the President, shall seek to mediate the differences.]

(c)(1) Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activites in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

(2) Any Federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with approved state management programs.

(3)(A) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months

after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

(B) After the management program of any coastal state has been approved by the Secretary under section 306, any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.) and regulations under such Act shall, with respect to any exploration, development, or production described in such plan and affecting any land use or water use in the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with such state's approved management program and will be carried out in a manner consistent with such program. No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information and until--

(i) such state or its designated agency, in accordance with the procedures required to be established by such state pursuant to subparagraph (A), concurs with such person's certification and notifies the Secretary and the Secretary of the Interior of such concurrence;

(ii) concurrence by such state with such certification is conclusively presumed, as provided for in subparagraph (A); or

(iii) the Secretary finds, pursuant to subparagraph (A), that each activity which is described in detail in such plan is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

If a state concurs or is conclusively presumed to concur, or if the Secretary makes such a finding, the provisions of subparagraph (A) are not applicable with respect to such person, such state, and any Federal license or permit which is required to conduct any activity affecting land uses or water uses in the coastal zone of such state which is described in detail in the plan to which such concurrence or finding applies. If such state objects to such certification and if the Secretary fails to make a finding under clause (iii) with respect to such certification, or if such person fails substantially to comply with such plan as submitted, such person shall submit an amendment to such plan, or a new plan, to the Secretary of the Interior. With respect to any amendment or new plan submitted to the Secretary of the Interior pursuant to the preceding sentence, the applicable time period for purposes of concurrence by conclusive presumption under subparagraph (A) is 3 months; and

(d) State and local governments submitting applications for Federal assistance under other Federal programs affecting the coastal zone shall indicate the views of the appropriate state or local agency as to the relationship of such activities to the approved management program for the coastal zone. Such applications shall be submitted and coordinated in accordance with the provisions of title IV of the Intergovernmental Coordination Act of 1968 (82 Stat. 1098). Federal agencies shall not approve proposed projects that are inconsistent with a coastal state's management program, except upon a finding by the Secretary that such project is consistent with the purposes of this title or necessary in the interest of national security.

(e) Nothing in this title shall be construed--

(1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters; nor to displace, supersede, limit, or modify any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more states or of two or more states and the Federal Government; nor to limit the authority of Congress to authorize and fund projects;

(2) as superseding, modifying, or repealing existing laws applicable to the various Federal agencies; nor to affect the jurisdiction, powers, or prerogatives of the International Joint Commission, United States and Canada, the Permanent Engineering Board, and the United States operating entity or entities established pursuant to the Columbia River Basin Treaty, signed at Washington, January 17, 1961, or the International Boundary and Water Commission, United States and Mexico.

(f) Notwithstanding any other provision of this title, nothing in this title shall in any way affect any requirement (1) established by the Federal Water Pollution Control Act, as amended, or the Clean Air Act, as amended, or (2) established by the Federal Government or by any state or local government pursuant to such Acts. Such requirements shall be incorporated in any program developed pursuant to this title and shall be the water pollution control and air pollution control requirements applicable to such program.

(g) When any state's coastal zone management program, submitted for approval or proposed for modification pursuant to section 306 of this title, includes requirements as to shorelands which also would be subject to any Federally supported national land use program which may be hereafter enacted, the Secretary, prior to approving such program, shall obtain the concurrence of the Secretary

of the Interior, or such other Federal official as may be designated to administer the national land use program, with respect to that portion of the coastal zone management program affecting such inland areas.

(h) In case of serious disagreement between any Federal agency and a coastal state--

(1) in the development or the initial implementation of a management program under section 305; or

(2) in the administration of a management program approved under section 306;

the Secretary, with the cooperation of the Executive Office of the President, shall seek to mediate the differences involved in such disagreement. The process of such mediation shall, with respect to any disagreement described in paragraph (2), include public hearings which shall be conducted in the local area concerned.

COASTAL ENERGY IMPACT PROGRAM

SEC. 308. (a) (1) The Secretary shall administer and coordinate, as part of the coastal zone management activities of the Federal Government provided for under this title, a coastal energy impact program. Such program shall consist of the provision of financial assistance to meet the needs of coastal states and local governments in such states resulting from specified activities involving energy development. Such assistance, which includes—

- (A) grants, under subsection (b), to coastal states for the purposes set forth in subsection (b)(4) with respect to consequences resulting from the energy activities specified therein;
- (B) grants, under subsection (c), to coastal states for study of, and planning for, consequences relating to new or expanded energy facilities in, or which significantly affect, the coastal zone;
- (C) loans, under subsection (d)(1), to coastal states and units of general purpose local government to assist such states and units to provide new or improved public facilities or public services which are required as a result of coastal energy activity;
- (D) guarantees, under subsection (d)(2) and subject to the provisions of subsection (f), of bonds or other evidences of indebtedness issued by coastal states and units of general purpose local government for the purpose of providing new or improved public facilities or public services which are required as a result of coastal energy activity;
- (E) grants or other assistance, under subsection (d)(3), to coastal states and units of general purpose local government to enable such states and units to meet obligations under loans or guarantees under subsection (d)(1) or (2) which they are unable to meet as they mature, for reasons specified in subsection (d)(3); and
- (F) grants, under subsection (d)(4), to coastal states which have suffered, are suffering, or will suffer any unavoidable loss of a valuable environmental or recreational resource;

shall be provided, administered, and coordinated by the Secretary in accordance with the provisions of this section and under the rules and regulations required to be promulgated pursuant to paragraph (2). Any such financial assistance shall be subject to audit under section 313.

(2) The Secretary shall promulgate, in accordance with section 317, such rules and regulations (including, but not limited to, those required under subsection (e)) as may be necessary and appropriate to carry out the provisions of this section.

(b) The Secretary shall make grants annually to coastal states, in accordance with the provisions of this subsection.

(2) The amounts granted to coastal states under this subsection shall be, with respect to any such state for any fiscal year, the sum of the amounts calculated, with respect to such state, pursuant to subparagraphs (A), (B), (C), and (D):

(A) An amount which bears, to one-third of the amount appropriated for the purpose of funding grants under this subsection for such fiscal year, the same ratio that the amount of outer Continental Shelf acreage which is adjacent to such state and which is newly leased by the Federal Government in the immediately preceding fiscal year bears to the total amount of outer Continental Shelf acreage which is newly leased by the Federal Government in such preceding year.

(B) An amount which bears, to one-sixth of the amount appropriated for such purpose for such fiscal year, the same ratio that the volume of oil and natural gas produced in the immediately preceding fiscal year from the outer Continental Shelf acreage which is adjacent to such state and which is leased by the Federal

Government bears to the total volume of oil and natural gas produced in such year from all of the outer Continental Shelf acreage which is leased by the Federal Government.

(C) An amount which bears, to one-sixth of the amount appropriated for such purpose for such fiscal year, the same ratio that the volume of oil and natural gas produced from outer Continental Shelf acreage leased by the Federal Government which is first landed in such state in the immediately preceding fiscal year bears to the total volume of oil and natural gas produced from all outer Continental Shelf acreage leased by the Federal Government which is first landed in all of the coastal states in such year.

(D) An amount which bears, to one-third of the amount appropriated for such purpose for such fiscal year, the same ratio that the number of individuals residing in such state in the immediately preceding fiscal year who obtain new employment in such year as a result of new or expanded outer Continental Shelf energy activities bears to the total number of individuals residing in all of the coastal states in such year who obtain new employment in such year as a result of such outer Continental Shelf energy activities.

(3) (A) The Secretary shall determine annually the amounts of the grants to be provided under this subsection and shall collect and evaluate such information as may be necessary to make such determinations. Each Federal department, agency, and instrumentality shall provide to the Secretary such assistance in collecting and evaluating relevant information as the Secretary may request. The Secretary shall request the assistance of any appropriate state agency in collecting and evaluating such information.

(B) For purposes of making calculations under paragraph (2), outer Continental Shelf acreage is adjacent to a particular coastal state if such acreage lies on that state's side of the extended lateral seaward boundaries of such state. The extended lateral seaward boundaries of a coastal state shall be determined as follows:

(i) If lateral seaward boundaries have been clearly defined or fixed by an interstate compact, agreement, or judicial decision (if entered into, agreed to, or issued before the date of the enactment of this paragraph), such boundaries shall be extended on the basis of the principles of delimitation used to so define or fix them in such compact, agreement, or decision.

(ii) If no lateral seaward boundaries, or any portion thereof, have been clearly defined or fixed by an interstate compact, agreement, or judicial decision, lateral seaward boundaries shall be determined according to the applicable principles of law, including the principles of the Convention on the Territorial Sea and the Contiguous Zone, and extended on the basis of such principles.

(iii) If, after the date of enactment of this paragraph, two or more coastal states enter into or amend an interstate compact or agreement in order to clearly define or fix lateral seaward boundaries, such boundaries shall thereafter be extended on the basis of the principles of delimitation used to so define or fix them in such compact or agreement.

(C) For purposes of making calculations under this subsection, the transitional quarter beginning July 1, 1976, and ending September 30, 1976, shall be included within the fiscal year ending June 30, 1976.

(4) Each coastal state shall use the proceeds of grants received by it under this subsection for the following purposes (except that priority shall be given to the use of such proceeds for the purpose set forth in subparagraph (A)):

(A) The retirement of state and local bonds, if any, which are guaranteed under subsection (d)(3); except that, if the amount of such grants is insufficient to retire both state and local bonds, priority shall be given to retiring local bonds.

(B) The study of, planning for, development of, and the carrying out of projects and programs in such state which are—

(i) necessary, because of the unavailability of adequate financing under any other subsection, to provide new or improved public facilities and public services which are required as a direct result of new or expanded outer Continental Shelf energy activity; and

(ii) of a type approved by the Secretary as eligible for grants under this paragraph, except that the Secretary may not disapprove any project or program for highways and secondary roads, docks, navigation aids, fire and police protection, water supply, waste collection and treatment (including drainage), schools and education, and hospitals and health care.

(C) The prevention, reduction, or amelioration of any unavoidable loss in such state's coastal zone of any valuable environmental or recreational resource if such loss results from coastal energy activity.

(5) The Secretary, in a timely manner, shall determine that each coastal state has expended or committed, and may determine that such state will expend or commit, grants which such state has received under this subsection in accordance with the purposes set forth in paragraph (4). The United States shall be entitled to recover from any coastal state an amount equal to any portion of any such grant received by such state under this subsection which—

(A) is not expended or committed by such state before the close of the fiscal year immediately following the fiscal year in which the grant was disbursed, or

(B) is expended or committed by such state for any purpose other than a purpose set forth in paragraph (4).

Before disbursing the proceeds of any grant under this subsection to any coastal state, the Secretary shall require such state to provide adequate assurances of being able to return to the United States any amounts to which the preceding sentence may apply.

(c) The Secretary shall make grants to any coastal state if the Secretary finds that the coastal zone of such state is being, or is likely to be, significantly affected by the siting, construction, expansion, or operation of new or expanded energy facilities. Such grants shall be used for the study of, and planning for (including, but not limited to, the application of the planning process included in a management program pursuant to section 305(b)(8), any economic, social, or environmental consequence which has occurred, is occurring, or is likely to occur in such state's coastal zone as a result of the siting, construction,

expansion, or operation of such new or expanded energy facilities. The amount of any such grant shall not exceed 80 per centum of the cost of such study and planning.

(d)(1) The Secretary shall make loans to any coastal state and to any unit of general purpose local government to assist such state or unit to provide new or improved public facilities or public services, or both, which are required as a result of coastal energy activity. Such loans shall be made solely pursuant to this title, and no such loan shall require as a condition thereof that any such state or unit pledge its full faith and credit to the repayment thereof. No loan shall be made under this paragraph after September 30, 1986.

(2) The Secretary shall, subject to the provisions of subsection (f), guarantee, or enter into commitments to guarantee, the payment of interest on, and the principal amount of, any bond or other evidence of indebtedness if it is issued by a coastal state or a unit of general purpose local government for the purpose of providing new or improved public facilities or public services, or both, which are required as a result of a coastal energy activity.

(3) If the Secretary finds that any coastal state or unit of general purpose local government is unable to meet its obligations pursuant to a loan or guarantee made under paragraph (1) or (2) because the actual increases in employment and related population resulting from coastal energy activity and the facilities associated with such activity do not provide adequate revenues to enable such state or unit to meet such obligations in accordance with the appropriate repayment schedule, the Secretary shall, after review of the information submitted by such state or unit pursuant to subsection (e)(3), take any of the following actions:

(A) Modify appropriately the terms and conditions of such loan or guarantee.

(B) Refinance such loan.

(C) Make a supplemental loan to such state or unit the proceeds of which shall be applied to the payment of principal and interest due under such loan or guarantee.

(D) Make a grant to such state or unit the proceeds of which shall be applied to the payment of principal and interest due under such loan or guarantee.

Notwithstanding the preceding sentence, if the Secretary—

(i) has taken action under subparagraph (A), (B), or (C) with respect to any loan or guarantee made under paragraph (1) or (2), and

(ii) finds that additional action under subparagraph (A), (B), or (C) will not enable such state or unit to meet, within a reasonable time, its obligations under such loan or guarantee and any additional obligations related to such loan or guarantee, the Secretary shall make a grant or grants under subparagraph (D) to such state or unit in an amount sufficient to enable such state or unit to meet such outstanding obligations.

(4) The Secretary shall make grants to any coastal state to enable such state to prevent, reduce, or ameliorate any unavoidable loss in such state's coastal zone of any valuable environmental or recreational resource, if such loss results from coastal energy activity. If the Secretary finds that such state has not received amounts under subsection (b) which are sufficient to prevent, reduce, or ameliorate such loss,

(e) Rules and regulations with respect to the following matters shall be promulgated by the Secretary as soon as practicable, but not later than 270 days after the date of the enactment of this section:

(1) A formula and procedures for apportioning equitably, among the coastal states, the amounts which are available for the provision of financial assistance under subsection (d). Such formula shall be based on, and limited to, the following factors:

(A) The number of additional individuals who are expected to become employed in new or expanded coastal energy activity, and the related new population, who reside in the respective coastal states.

(B) The standardized unit costs (as determined by the Secretary by rule), in the relevant regions of such states, for new or improved public facilities and public services which are required as a result of such expected employment and the related new population.

(2) Criteria under which the Secretary shall review each coastal state's compliance with the requirements of subsection (g)(2).

(3) Criteria and procedures for evaluating the extent to which any loan or guarantee under subsection (d) (1) or (2) which is applied for by any coastal state or unit of general purpose local government can be repaid through its ordinary methods and rates for generating tax revenues. Such procedures shall require such state or unit to submit to the Secretary such information which is specified by the Secretary to be necessary for such evaluation, including, but not limited to—

(A) a statement as to the number of additional individuals who are expected to become employed in the new or expanded coastal energy activity involved, and the related new population, who reside in such state or unit;

(B) a description, and the estimated costs, of the new or improved public facilities or public services needed or likely to be needed as a result of such expected employment and related new population;

(C) a projection of such state's or unit's estimated tax receipts during such reasonable time thereafter, not to exceed 30 years, which will be available for the repayment of such loan or guarantee; and

(D) a proposed repayment schedule.

The procedures required by this paragraph shall also provide for the periodic verification, review, and modification (if necessary) by the Secretary of the information or other material required to be submitted pursuant to this paragraph.

(4) Requirements, terms, and conditions (which may include the posting of security) which shall be imposed by the Secretary, in connection with loans and guarantees made under subsection (d)(1) and (2), in order to assure repayment within the time fixed, to assure that the proceeds thereof may not be used to provide public services for an unreasonable length of time, and otherwise to protect the financial interests of the United States.

(5) Criteria under which the Secretary shall establish rates of interest on loans made under subsection (d)(1) and (3). Such rates shall not exceed the current average market yield on out-

standing marketable obligations of the United States with remaining periods to maturity comparable to the maturity of such loans. In developing rules and regulations under this subsection, the Secretary shall, to the extent practicable, request the views of, or consult with, appropriate persons regarding impacts resulting from coastal energy activity.

(f)(1) Bonds or other evidences of indebtedness guaranteed under subsection (d)(2) shall be guaranteed on such terms and conditions as the Secretary shall prescribe, except that—

(A) no guarantee shall be made unless the indebtedness involved will be completely amortized within a reasonable period, not to exceed 30 years;

(B) no guarantee shall be made unless the Secretary determines that such bonds or other evidences of indebtedness will—

(i) be issued only to investors who meet the requirements prescribed by the Secretary, or, if an offering to the public is contemplated, be underwritten upon terms and conditions approved by the Secretary;

(ii) bear interest at a rate found not to be excessive by the Secretary; and

(iii) contain, or be subject to, repayment, maturity, and other provisions which are satisfactory to the Secretary;

(C) the approval of the Secretary of the Treasury shall be required with respect to any such guarantee, unless the Secretary of the Treasury waives such approval; and

"(D) no guarantee shall be made after September 30, 1986.

(2) The full faith and credit of the United States is pledged to the payment, under paragraph (5), of any default on any indebtedness guaranteed under subsection (d)(2). Any such guarantee made by the Secretary shall be conclusive evidence of the eligibility of the obligation involved for such guarantee, and the validity of any such guarantee so made shall be uncontested in the hands of a holder of the guaranteed obligation, except for fraud or material misrepresentation on the part of the holder, or known to the holder at the time acquired.

(3) The Secretary shall prescribe and collect fees in connection with guarantees made under subsection (d)(2). These fees may not exceed the amount which the Secretary estimates to be necessary to cover the administrative costs pertaining to such guarantees.

(4) The interest paid on any obligation which is guaranteed under subsection (d)(2) and which is received by the purchaser thereof (or the purchaser's successor in interest), shall be included in gross income for the purpose of chapter 1 of the Internal Revenue Code of 1954. The Secretary may pay out of the Fund to the coastal state or the unit of general purpose local government issuing such obligations not more than such portion of the interest on such obligations as exceeds the amount of interest that would be due at a comparable rate determined for loans made under subsection (d)(1).

(5)(A) Payments required to be made as a result of any guarantee made under subsection (d)(2) shall be made by the Secretary from

sums appropriated to the Fund or from moneys obtained from the Secretary of the Treasury pursuant to paragraph (6).

(B) If there is a default by a coastal state or unit of general purpose local government in any payment of principal or interest due under a bond or other evidence of indebtedness guaranteed by the Secretary under subsection (d)(2), any holder of such bond or other evidence of indebtedness may demand payment by the Secretary of the unpaid interest on and the unpaid principal of such obligation as they become due. The Secretary, after investigating the facts presented by the holder, shall pay to the holder the amount which is due such holder, unless the Secretary finds that there was no default by such state or unit or that such default has been remedied.

(C) If the Secretary makes a payment to a holder under subparagraph (B), the Secretary shall—

(i) have all of the rights granted to the Secretary or the United States by law or by agreement with the obligor; and

(ii) be subrogated to all of the rights which were granted such holder, by law, assignment, or security agreement between such holder and the obligor.

Such rights shall include, but not be limited to, a right of reimbursement to the United States against the coastal state or unit of general purpose local government for which the payment was made for the amount of such payment plus interest at the prevailing current rate as determined by the Secretary. If such coastal state, or the coastal state in which such unit is located, is due to receive any amount under subsection (b), the Secretary shall, in lieu of paying such amount to such state, deposit such amount in the Fund until such right of reimbursement has been satisfied. The Secretary may accept, in complete or partial satisfaction of any such rights, a conveyance of property or interests therein. Any property so obtained by the Secretary may be completed, maintained, operated, held, rented, sold, or otherwise dealt with or disposed of on such terms or conditions as the Secretary prescribes or approves. If, in any case, the sum received through the sale of such property is greater than the amount paid to the holder under subparagraph (B) plus costs, the Secretary shall pay any such excess to the obligor.

(D) The Attorney General shall, upon the request of the Secretary, take such action as may be appropriate to enforce any right accruing to the Secretary or the United States as a result of the making of any guarantee under subsection (d)(2). Any sums received through any sale under subparagraph (C) or recovered pursuant to this subparagraph shall be paid into the Fund.

(E) If the moneys available to the Secretary are not sufficient to pay any amount which the Secretary is obligated to pay under paragraph (5), the Secretary shall issue to the Secretary of the Treasury notes or other obligations (only to such extent and in such amounts as may be provided for in appropriation Acts) in such forms and denominations, bearing such maturities, and subject to such terms and conditions as the Secretary of the Treasury prescribes. Such notes or other obligations shall bear interest at a rate determined by the Secretary of the Treasury on the basis of the current average market yield on outstanding marketable obligations of the United States on comparable maturities during the month preceding the issuance of such notes or other obligations. Any sums received by the Secretary through such issuance shall be deposited in the Fund. The Secretary of the Treasury

shall purchase any notes or other obligations issued under this paragraph, and for this purpose such Secretary may use as a public debt transaction the proceeds from the sale of any securities issued under the Second Liberty Bond Act, as now or hereafter in force. The purposes for which securities may be issued under that Act are extended to include any purchase of notes or other obligations issued under this paragraph. The Secretary of the Treasury may at any time sell any of the notes or other obligations so acquired under this paragraph. All redemptions, purchases, and sales of such notes or other obligations by the Secretary of the Treasury shall be treated as public debt transactions of the United States.

(g) (1) No coastal state is eligible to receive any financial assistance under this section unless such state—

(A) has a management program which has been approved under section 306;

(B) is receiving a grant under section 305(c) or (d); or
(C) is, in the judgment of the Secretary, making satisfactory progress toward the development of a management program which is consistent with the policies set forth in section 303.

(2) Each coastal state shall, to the maximum extent practicable, provide that financial assistance provided under this section be apportioned, allocated, and granted to units of local government within such state on a basis which is proportional to the extent to which such units need such assistance.

(h) There is established in the Treasury of the United States the Coastal Energy Impact Fund. The Fund shall be available to the Secretary without fiscal year limitation as a revolving fund for the purposes of carrying out subsections (c) and (d). The Fund shall consist of—

(1) any sums appropriated to the Fund;
(2) payments of principal and interest received under any loan made under subsection (d)(1);
(3) any fees received in connection with any guarantee made under subsection (d)(2); and

(4) any recoveries and receipts under security, subrogation, and other rights and authorities described in subsection (f).

All payments made by the Secretary to carry out the provisions of subsections (c), (d), and (f) (including reimbursements to other Government accounts) shall be paid from the Fund, only to the extent provided for in appropriation Acts. Sums in the Fund which are not currently needed for the purposes of subsections (c), (d), and (f) shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

(i) The Secretary shall not interfere in any land use or water use decision of any coastal state with respect to the siting of any energy facility or public facility by making siting in a particular location a prerequisite to, or a condition of, financial assistance under this section.

(j) The Secretary may evaluate, and report to the Congress, on the efforts of the coastal states and units of local government therein to reduce or ameliorate adverse consequences resulting from coastal energy activity and on the extent to which such efforts involve adequate consideration of alternative sites.

(k) To the extent that Federal funds are available under, or pursuant to, any other law with respect to—

(1) study and planning for which financial assistance may be provided under subsection (b)(4)(B) and (c), or

(2) public facilities and public services for which financial assistance may be provided under subsection (b)(4)(B) and (d), the Secretary shall, to the extent practicable, administer such subsections—

(A) on the basis that the financial assistance shall be in addition to, and not in lieu of, any Federal funds which any coastal state or unit of general purpose local government may obtain under any other law; and

(B) to avoid duplication.

(l) As used in this section—

(1) The term 'retirement', when used with respect to bonds, means the redemption in full and the withdrawal from circulation of those which cannot be repaid by the issuing jurisdiction in accordance with the appropriate repayment schedule.

(2) The term 'unavoidable', when used with respect to a loss of any valuable environmental or recreational resource, means a loss, in whole or in part—

(A) the costs of prevention, reduction, or amelioration of which cannot be directly or indirectly attributed to, or assessed against, any identifiable person; and

(B) cannot be paid for with funds which are available under, or pursuant to, any provision of Federal law other than this section.

(3) The term 'unit of general purpose local government' means any political subdivision of any coastal state or any special entity created by such a state or subdivision which (in whole or part) is located in, or has authority over, such state's coastal zone, and which (A) has authority to levy taxes or establish and collect user fees, and (B) provides any public facility or public service which is financed in whole or part by taxes or user fees. .

INTERSTATE GRANTS

Sec. 309. (a) The coastal states are encouraged to give high priority--

(1) to coordinating state coastal zone planning, policies, and programs
with respect to contiguous areas of such states; and

(2) to studying, planning, and implementing unified coastal zone policies
with respect to such areas.

Such coordination, study, planning, and implementation may be conducted pursuant
to interstate agreements or compacts. The Secretary may make grants annually,
in amounts not to exceed 90 per centum of the cost of such coordination, study,
or implementation, if the Secretary finds that the proceeds of such grants will
be used for purposes consistent with sections 305 and 306.

(b) The consent of the Congress is hereby given to two or more coastal
states to negotiate, and to enter into, agreements or compacts, which do not
conflict with any law or treaty of the United States, for--

(1) developing and administering coordinated coastal zone planning,
policies, and programs pursuant to sections 305 and 306; and

(2) establishing executive instrumentalities or agencies which such
states deem desirable for the effective implementation of such agreements or
compacts.

Such agreements or compacts shall be binding and obligatory upon any state or party
thereto without further approval by the Congress.

(c) Each executive instrumentality or agency which is established by an
interstate agreement or compact pursuant to this section is encouraged to adopt
a Federal-State consultation procedure for the identification, examination, and
cooperative resolution of mutual problems with respect to the marine and coastal
areas which affect, directly or indirectly, the applicable coastal zone. The
Secretary, the Secretary of the Interior, the Chairman of the Council on Environmental

Quality, the Administrator of the Environmental Protection Agency, the Secretary of the department in which the Coast Guard is operating, and the Administrator of the Federal Energy Administration, or their designated representatives, shall participate ex officio on behalf of the Federal Government whenever any such Federal-State consultation is requested by such an instrumentality or agency.

(d) If no applicable interstate agreement or compact exists, the Secretary may coordinate coastal zone activities described in subsection (a) and may make grants to assist any group of two or more coastal states to create and maintain a temporary planning and coordinating entity to--

(1) coordinate state coastal zone planning, policies, and programs with respect to contiguous areas of the states involved;

(2) study, plan, and implement unified coastal zone policies with respect to such areas; and

(3) establish an effective mechanism, and adopt a Federal-State consultation procedure, for the identification, examination, and cooperative resolution of mutual problems with respect to the marine and coastal areas which affect, directly or indirectly, the applicable coastal zone.

The amount of such grants shall not exceed 90 per centum of the cost of creating and maintaining such an entity. The Federal officials specified in subsection (c), or their designated representatives, shall participate on behalf of the Federal Government, upon the request of any such temporary planning and coordinating entity.

RESEARCH AND TECHNICAL ASSISTANCE FOR COASTAL ZONE MANAGEMENT

Sec. 310. (a) The Secretary may conduct a program of research, study, and training to support the development and implementation of management programs. Each department, agency, and instrumentality of the executive branch of the Federal Government may assist the Secretary, on a reimbursable basis or otherwise, in

in carrying out the purposes of this section, including, but not limited to, the furnishing of information to the extent permitted by law, the transfer of personnel with their consent and without prejudice to their position and rating, and the performance of any research, study, and training which does not interfere with the performance of the primary duties of such department agency, or instrumentality. The Secretary may enter into contracts or other arrangements with any qualified person for the purposes of carrying out this subsection.

(b) The Secretary may make grants to coastal states to assist such states in carrying out research, studies, and training required with respect to coastal zone management. The amount of any grant made under this subsection shall not exceed 80 per centum of the cost of such research, studies, and training.

(c) (1) The Secretary shall provide for the coordination of research, studies, and training activities under this section with any other such activities that are conducted by, or subject to the authority of, the Secretary.

(2) The Secretary shall make the results of research conducted pursuant to this section available to any interested person.

PUBLIC HEARINGS

Sec. [308] 311. All public hearings required under this title must be announced at least thirty days prior to the hearing date. At the time of the announcement, all agency materials pertinent to the hearings, including documents, studies, and other data, must be made available to the public for review and study. As similar materials are subsequently developed, they shall be made available to the public as they become available to the agency.

REVIEW OF PERFORMANCE

Sec. [309] 312. (a) [The Secretary shall conduct a continuing review of the management programs of the coastal states and of the performance of each state.] The Secretary shall conduct a continuing review of--

(1) the management programs of the coastal states and the performance of such states with respect to coastal zone management; and

(2) the coastal energy impact program provided for under section 308.

(b) The Secretary shall have the authority to terminate any financial assistance extended under section 306 and to withdraw any unexpended portion of such assistance if (1) he determines that the state is failing to adhere to and is not justified in deviating from the program approved by the Secretary; and (2) the state has been given notice of the proposed termination and withdrawal and given an opportunity to present evidence of adherence or justification for altering its program.

RECORDS AND AUDITS

Sec. [310] 313. (a) Each recipient of a grant under this title or of financial assistance under section 308 shall keep such records as the Secretary shall prescribe, including records which fully disclose the amount and disposition of the funds received under the grant and of the proceeds of such assistance, the total cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

(b) The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall [have access for the purpose of audit and examination to any books, documents, papers, and the records of the recipient of the grant that are pertinent to the determination that funds granted are used in accordance with this title.]

(1) after any grant is made under this title or any financial assistance is provided under section 308(d); and

(2) until the expiration of 3 years after--

(A) completion of the project, program or other undertaking for which such grant was made or used, or

(B) repayment of the loan or guaranteed indebtedness for which such financial assistance was provided,

have access for purposes of audit and examination to any record, book, have access for purposes of audit and examination to any record, book, document, and paper which belongs to, or is used or controlled by, any recipient of the grant funds or any person who entered into any transaction relating to such financial assistance and which is pertinent for purposes of determining if the grant funds or the proceeds of such financial assistance are being, or were, used in accordance with the provisions of this title.

ADVISORY COMMITTEE

Sec. [311] 314. (a) The Secretary is authorized and directed to establish a Coastal Zone Management Advisory Committee to advise, consult with, and make recommendations to the Secretary on matters of policy concerning the coastal zone. Such committee shall be composed of not more than fifteen persons designated by the Secretary and shall perform such functions and operate in such a manner as the Secretary may direct. The Secretary shall insure that the committee membership as a group possesses a broad range of experience and knowledge relating to problems involving management, use, conservation, protection, and development of coastal zone resources.

(b) Members of the committee who are not regular full-time employees of the United States, while serving on the business of the committee, including traveltime, may receive compensation at rates not exceeding \$100 per diem; and while so serving away from their homes or regular places of business may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for individuals in the Government service employed intermittently.

ESTUARINE SANCTUARIES AND BEACH ACCESS

(Entire Old Section 312 Significantly Revised)

Sec. 315. The Secretary may, in accordance with this section and in accordance with such rules and regulations as the Secretary shall promulgate, make grants to any coastal state for the purpose of--

(1) acquiring, developing, or operating estuarine sanctuaries, to serve as natural field laboratories in which to study and gather data on the natural and human processes occurring within the estuaries of the coastal zone; and

(2) acquiring lands to provide for access to public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value, and for the preservation of islands.

The amount of any such grant shall not exceed 50 per centum of the cost of the project involved: except that, in the case of acquisition of any estuarine sanctuary, the Federal share of the cost thereof shall not exceed \$2,000,000.

ANNUAL REPORT

Sec. [313] 316. (a) The Secretary shall prepare and submit to the President for transmittal to the Congress not later than November 1 of each year a report on the administration of this title for the preceding fiscal year. The report shall include but not be restricted to (1) an identification of the state programs approved pursuant to this title during the preceding Federal fiscal year and a description of those programs; (2) a listing of the states participating in the provisions of this title and a description of the status of each state's programs and its accomplishments during the preceding Federal fiscal year; (3) an itemization of the allocation of funds to the various coastal states and a breakdown of the major projects and areas on which these funds were expended; (4) an identification of any state programs which have been reviewed and disapproved or with respect to which grants have been terminated under this title, and a statement of the reasons

for such action; (5) a listing of all activities and projects which, pursuant to the provisions of subsection (c) or subsection (d) of section 307, are not consistent with an applicable approved state management program; (6) a summary of the regulations issued by the Secretary or in effect during the preceding Federal fiscal year; (7) a summary of a coordinated national strategy and program for the Nation's coastal zone including identification and discussion of Federal, regional, state, and local responsibilities and functions therein; (8) a summary of outstanding problems arising in the administration of this title in order of priority; (9) a description of the economic, environmental, and social consequences of energy activity affecting the coastal zone and an evaluation of the effectiveness of financial assistance under section 308 in dealing with such consequences; (10) a description and evaluation of applicable interstate and regional planning and coordination mechanisms developed by the coastal states; (11) a summary and evaluation of the research, studies, and training conducted in support of coastal zone management; [and (9)] (12) such other information as may be appropriate.

(b) The report required by subsection (a) shall contain such recommendations for additional legislation as the Secretary deems necessary to achieve the objectives of this title and enhance its effective operation.

RULES AND REGULATIONS

Sec. [314] 317. The Secretary shall develop and promulgate, pursuant to section 553 of title 5, United States Code, after notice and opportunity for full participation by relevant Federal agencies, state agencies, local governments, regional organizations, port authorities, and other interested parties, both public and private, such rules and regulations as may be necessary to carry out the provisions of this title.

AUTHORIZATION OF APPROPRIATIONS

Sec. [315] 318. (a) There are authorized to be appropriated to the

Secretary--

(1) such sums, not to exceed \$20,000,000 for each of the fiscal years ending September 30, 1977, September 30, 1978, and September 30, 1979, respectively, as may be necessary for grants under section 305, to remain available until expended;

(2) such sums, not to exceed \$50,000,000 for each of the fiscal years ending September 30, 1977, September 30, 1978, September 30, 1979, and September 30, 1980, respectively, as may be necessary for grants under section 306, to remain available until expended;

(3) such sums, not to exceed \$50,000,000 for each of the 8 fiscal years occurring during the period beginning October 1, 1976, and ending September 30, 1984, as may be necessary for grants under section 308(b);

(4) such sums, not to exceed \$5,000,000 for each of the fiscal years ending September 30, 1977, September 30, 1978, September 30, 1979, and September 30, 1980, respectively, as may be necessary for grants under section 309, to remain available until expended;

(5) such sums, not to exceed \$10,000,000 for each of the fiscal years ending September 30, 1977, September 30, 1978, September 30, 1979, and September 30, 1980, respectively, as may be necessary for financial assistance under section 310, of which 50 per centum shall be for financial assistance under section 310(a) and 50 per centum shall be for financial assistance under section 310(b), to remain available until expended;

(6) such sums, not to exceed \$6,000,000 for each of the fiscal years ending September 30, 1977, September 30, 1978, September 30, 1979, and September 30, 1980, respectively, as may be necessary for grants under section 315(1), to remain available until expended;

(7) such sums, not to exceed \$25,000,000 for each of the fiscal years ending September 30, 1977, September 30, 1978, September 30, 1979, and September

30, 1980, respectively, as may be necessary for grants under section 315(2), to remain available until expended; and

(8) such sums, not to exceed \$5,000,000 for each of the fiscal years ending September 30, 1977, September 30, 1978, September 30, 1979, and September 30, 1980, respectively, as may be necessary for administrative expenses incident to the administration of this title.

(b) There are authorized to be appropriated until October 1, 1986, to the Fund, such sums, not to exceed \$800,000,000 for the purposes of carrying out the provisions of section 308, other than subsection (b), of which not to exceed \$50,000,000 shall be for purposes of subsections (c) and (d)(4) of such section.

(c) Federal funds received from other sources shall not be used to pay a coastal state's share of costs under section 305, 306, 309, or 310.

Contained in P.L. 94-370 but not Incorporated
Directly into the CZMA

Sec. 15. ADMINISTRATION.

(a) There shall be in the National Oceanic and Atmospheric Administration an Associate Administrator for Coastal Zone Management, who shall be appointed by the President, by and with the advice and consent of the Senate. Such Associate Administrator shall be an individual who is, by reason of background and experience, especially qualified to direct the implementation and administration of the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.). Such Associate Administrator shall be compensated at the rate now or hereafter provided for level V of the Executive Schedule Pay Rates (5 U.S.C. 5316).

(b) Section 5316 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

(140) Associate Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration.

(c) The Secretary may, to carry out the provisions of the amendments made by this Act, establish, and fix the compensation for, four new positions without regard to the provision of chapter 51 of title 5, United States Code, at rates not in excess of the maximum rate for CS-18 of the General Schedule under section 5332 of such title. Any such appointment may, at the discretion of the Secretary, be made without regard to the provisions of such title 5 governing appointments in the competitive service.

Sec. 16. SHELLFISH SANITATION REGULATIONS.

(a) The Secretary of Commerce shall--

(1) undertake a comprehensive review of all aspects of the molluscan shellfish industry, including, but not limited to, the harvesting, processing, and transportation of such shellfish; and

(2) evaluate the impact of Federal law concerning water quality on the molluscan shellfish industry.

The Secretary of Commerce shall, not later than April 30, 1977, submit a report to the Congress of the findings, comments, and recommendations (if any) which result from such review and evaluation..

(b) The Secretary of Health, Education, and Welfare shall not promulgate final regulations concerning the national shellfish safety program before June 30, 1977. At least 60 days prior to the promulgation of any such regulations, the Secretary of Health, Education, and Welfare, in consultation with the Secretary of Commerce, shall publish an analysis (1) of the economic impact of such regulations on the domestic shellfish industry, and (2) the cost of such national shellfish safety program relative to the benefits that it is expected to achieve.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECRETARY OF THE INTERIOR, et al.,)
Defendant-Appellants)
v.) Case No. 76-6122
COUNTY OF SUFFOLK, et al.,)
Plaintiff-Appellees.)

CERTIFICATE OF SERVICE

I, E. Edward Bruce, a member of the bar of this Court, hereby certify that copies of the Brief of Appellants, National Ocean Industries Association, et al., were served on the following persons this 11th day of September, 1976, by first class mail, postage prepaid:

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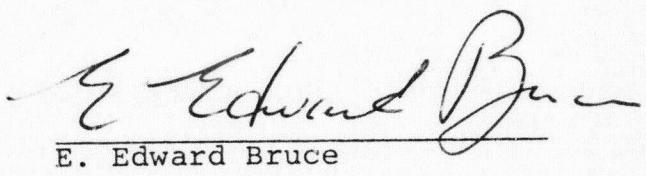
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